Public Utilities

FORTNIGHTLY

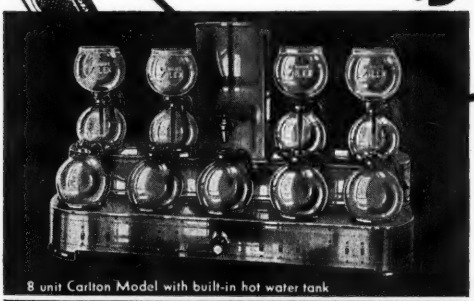
February 15, 1940

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

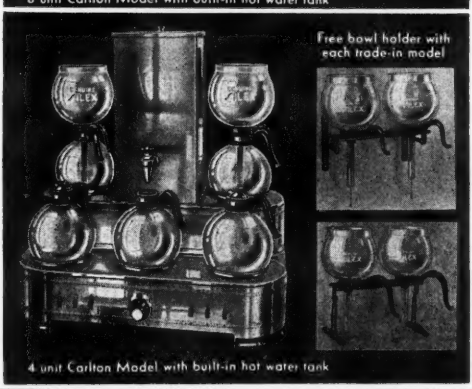
$50.00

TRADE-IN ALLOWANCE ON 8-UNIT CARLTON MODEL Genuine SILEX

$35.00 ALLOWANCE ON 4-UNIT CARLTON MODEL Genuine SILEX



8 unit Carlton Model with built-in hot water tank



4 unit Carlton Model with built-in hot water tank

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Trade-in offer expires March 31, 194

Other models for either gas or electri service are available from $15.9 Pyrex brand glass used exclusively.

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Genuine SILEX GLASS COFFEE MAKER

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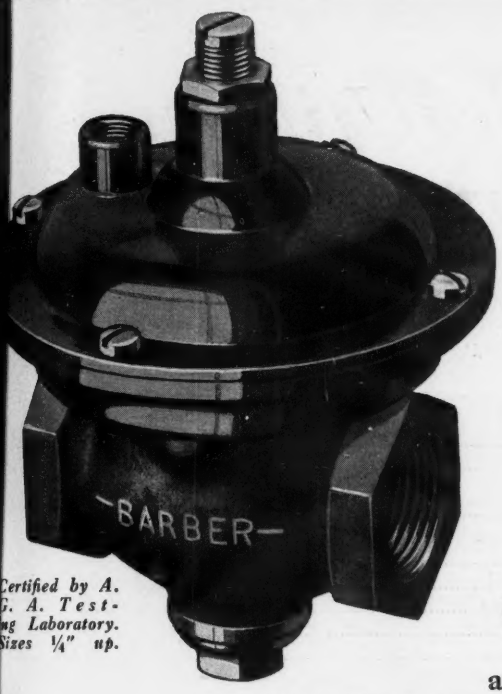

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THERE is no such thing as a *pretty good* gas pressure regulator. On a control device so essential for safety and economy you simply *must* have dependable performance. Your regulator must respond like the muscles of a trained athlete. Barber Regulators are built that way. They are sensitive to minute pressure variations. Carefully constructed of the best materials, Barber Regulators are also styled in conformance with modern gas appliance design. Bodies are all bronze, working parts of brass, springs of phosphor bronze, diaphragm of selected sheepskin. Moderately priced, Barber is today's finest regulator value.

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Public Utilities Fortnightly

VOLUME XXV *February 15, 1940* NUMBER 4

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

Advertising Section

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

HOLLYWOOD has apparently decreed that good Americans should see American history last, cinematically speaking. This decision comes after a decade of biographical ransacking of ancient castles, mouldy novels, remote cupboards, and some occasional garbage cans of European history. We have had movie classics about Henry the VIII; Queen Elisabeth; Mary, Queen of Scots; Marie Antoinette; Napoleon Bonaparte; Zola; Pasteur; Disraeli; Juarez; and the unlucky Romanoffs.

BUT now the moguls of shadowland have trained their cameras on our historic affairs. At this writing, "Gone with the Wind" and "Abe Lincoln of Illinois" are both being shown in Washington. This should, for a time at least, assuage any popular hunger for costume pieces in Technicolored hoop skirts. Of passing interest to those concerned with the public utility business should be the fact that this agenda is apparently bringing belated recognition, of a romantic type, to the lives of noted pioneers in the public service.

THE great inventor of the telephone, Alexander Graham Bell, received a good going over in the grand manner in one of the better films of 1939. Now the word comes from the Pacific coast, via our editorial grapevine, that the late Thomas A. Edison is definitely scheduled for release and next, Eli Whitney, of cotton-gin fame. And after that it is rumored that several early American railroad presidents (now having their sideburns screen tested, no doubt) may make the grade.

RILEY E. ELGEN

For utilities which standardize, the future should hold few terrors.

(SEE PAGE 195)

FERGUS J. MCDIARMID

The rate of utility outgo is increasing faster than utility income.

(SEE PAGE 204)

VERILY, this seems to be the season for inventors, discoverers, and industrial pioneers. We know not whether it is the European war which has thus turned the eyes of the Hollywood scenarists inward to our own rich heritage of romantic biographies. As for the sudden interest in the industrial heroes, it may be that the movies have run out of dramatic statesmen, artists, composers, and those more colorful characters, such as old Diamond Jim Brady and the illustrious Jesse James. In any event, the change should be a welcome relief. When the promoter of a western railroad is pictured as a romantic empire builder instead of a cruel, conniving tyrant going around burning down widows' houses and shooting down their sons for the sake of a miserable strip of desolate right-of-

way, a change has certainly come over Hollywood. Could it be the omen of a conservative swing?

WELL, even if the war is not responsible for making the movie industry turn backward time in its flight, it certainly seems to have made the rest of us more anxious about the future. Time was, not so long ago, when the average middle-of-the-road citizen was willing to leave such weighty matters as the state of the union and of world civilization ten or twenty years from now in the hands of some sound, competent commission. This body would go off and make a good job of it, leaving the rest of us alone in the peaceful enjoyment of what we thought was our national security.

BUT nowadays everybody seems to be worried about the future. It is no longer one of those specialized worries that can be delegated to professional crystal gazers, radical magazines, and serious but dull young fellows, who like to write books with such formidable titles as "Which Way America," or "Columbia at the Crossroads." Even our daily newspapers offer no relief. Not content with covering the present, the omniscient columnists have to delve into a highly problematical future and describe to us what the world would would be like if the Germans win, or if the Allies win, or if both sides collapse in a dogfall and permit the Kremlin to spread the gospel of Marx unhindered.

COMING closer to home, there is a pronounced accent on industrial prophecy. There is a good reason for this; and it is certainly not because the American business man likes to go puttering around with imponderables. It is simply that, in this day of shrinking profits and increasing operating expenses, he wants to find out (if he can) which avenues remain open or at least give some promise of return for private enterprise, and which are likely to peter out into trackless effort or hopeless *culs-de-sac*. There is more responsibility than ever before upon management to lay the right plan and make the proper decision now against the slings and arrows of a highly unpredictable fortune only a few years hence.

STRIKING this tempo, we present in this issue two forward-looking articles dealing primarily with the future of the electric industry, but to some extent with utility enterprise in general. The more optimistic of these is the product of the chairman of the public utilities commission of the District of Columbia, RILEY E. ELGEN, well known for his expert analysis of utility affairs from the regulatory viewpoint. MR. ELGEN was born and raised in Maryland, graduating from St. Johns College at Annapolis (B.S., 1903). An engineer by profession, MR. ELGEN served as a valuation expert for the ICC from 1916 to 1932, after which he became a commissioner.

J. HARRY LABRUM

Augmenting the regulatory procedure is not necessarily a step towards its simplification.

(SEE PAGE 214)

THE second of these prophetic industrial analyses was written by FERGUS J. MCDIARMID, the Canadian-bred financial expert of the Lincoln National Life Insurance Company of Fort Wayne, Ind. As an official responsible in part for the safe yet profitable investment of other people's money, MR. MCDIARMID is perhaps inescapably disposed towards a cynical, if not pessimistic, outlook. Yet, it is well to remember that institutional investors are still strong on utilities.

SOME weeks ago we published an article by a former staff member of the Pennsylvania utility commission which extolled the virtues of temporary rate making as practiced in the Keystone state. It appeared shortly thereafter that the legal profession engaged in utility practice was not unanimous in its approval of Pennsylvania temporary rate making. The result was an article on the same subject from a more disinterested point of view (see page 214). The author, J. HARRY LABRUM, is a member of a Philadelphia firm of attorneys. He has been prominent in bar association affairs not only in his own state, but through committee work with the American Bar Association. In addition to his other talents, MR. LABRUM was formerly a newspaper man with the Washington bureau of the *Philadelphia Public Ledger*.

THE next number of this magazine will be out March 1st.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

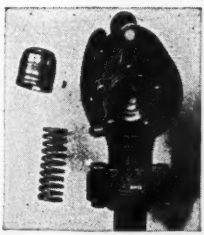
In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 193–256, from 31 PUR(NS)

VULCAN VALVE HEAD, LG-1

The Vulcan Automatic Valve Operating Head is an advanced development for the high and ever increasing higher pressure and temperature conditions encountered in modern steam plants. Simplicity is the keynote in design and construction. A piston valve steam actuated thru a pilot valve provides positive operation—makes Vulcan Automatic Heads the greatest step ahead in Soot Blower Design in the past 15 years.



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Vulcan Valves of completely corrosion resistant materials and stainless steels are designed for immediate accessibility; they are so successfully designed that of thousands in use no valve of this type has ever failed in service. Vulcan construction permits adaptation to every increase in pressure for modern boilers—no valve stems to break—no opening or closing against steam pressure—no regrinding of valves is ever required—valve packing is eliminated. All Vulcan Heads are equipped with Vulcan pioneer Under Arm Supports which have eliminated warpage of elements.

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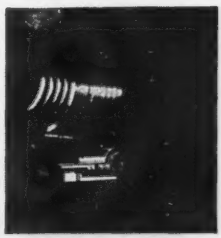

VULCAN VALVE DETAIL

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Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

S. B. WILLIAMS
Editor, Electrical World.

"The saying that 'Life begins in 40' may have to be revised for the utility holding companies."

LISTER HILL
U. S. Senator from Alabama.

"When war comes to a great nation like ours, it is the power supply and not the manpower which limits military strength."

GEORGE D. AIKEN
Governor of Vermont.

"When the interest and participation of citizens in government stops, centralization and dictatorship have already set in."

FRANK B. KEEFE
U. S. Representative from Wisconsin.

"We should have a Congress of men able to stand on their own feet and defy bureaucracy in this country and abolish these bureaus, boards, and commissions. . . ."

EDITORIAL STATEMENT
Public Service Magazine.

"Assuming that public and private operations are on an equal basis, where neither enjoys privileges denied the other, there is no appreciable difference in the objectives of the two."

HUGH S. MAGILL
President, American Federation of Investors, Inc.

"One of the most serious developments in the industrial and governmental life of our country during recent years is the growth and dominating influence of pressure groups."

HAROLD L. ICKES
U. S. Secretary of the Interior.

"You [coal industry] have cause to rejoice because, alone among our industrialists, you are in a favorable position to prepare yourselves to cope with the economic aftermath of the European war."

H. STYLES BRIDGES
U. S. Senator from New Hampshire.

"The assets of the six largest government corporations total more than nine billion dollars. The six largest private industrial corporations have assets of only slightly more than seven billion."

WALTER W. R. MAY
Director of Industrial Development, Portland General Electric Company.

". . . government has, for purposes of making relief work, centralizing its authority, and 'tending its political fences, impressed us with what we already know—namely, that industrial vitamins would be good for what ails us!"

GEORGE W. NORRIS
U. S. Senator from Nebraska.

"I should like to provide for the damming of every interstate stream in the United States, first and primarily to control floodwaters and, as a constitutional peg, to improve navigation, and then to develop all the power that can be developed consistent with flood control and navigation."

JACOB THORKELSON
U. S. Representative from Montana.

"The idea of the Federal government's employing publicity bureaus, to distribute government propaganda, should be obnoxious to every American citizen. We expect advance agents to sell a circus, but I do not believe the public is ready to make government ballyhoo a permanent department."

ELMER A. SMITH
General Attorney, Illinois Central System.

"There is just as much reason for the government to subsidize the railroads by taking over the cost of furnishing and maintaining their right of way, roadbed, and tracks as there is for the government to subsidize barges and boats operating on the inland waterways by furnishing free waterways."

EDITORIAL STATEMENT
Business Digest.

"Many traditional American institutions have been sadly mauled in recent years, but none has been so seriously attacked, with so little public opposition, as our cherished freedom of speech, by the ruling of controversial speakers off the air by the code committee of the National Association of Broadcasters."

Excerpt from press release, U. S. Department of the Interior, Bureau of Reclamation.

"An example of a new problem met and mastered by Reclamation engineers in building Boulder dam was the ingenious cooling of the great mass of concrete by means of cold water circulating through hundreds of miles of pipe built into the structure. Left to itself, Boulder dam would have taken 150 years to cool off."

EDITORIAL STATEMENT
Telephone Engineer.

"Too many times the press representing industry is prone to criticize or oppose governmental regulatory rules and orders which it deems highly detrimental to the industry it represents, perhaps without giving due credit to governmental commissions for actions which give practical, needed, and deserved relief to the industry."

JOHN C. PAGE
Commissioner, Bureau of Reclamation.

"The contrast between the wholesome national policies which have been absorbing our attention and energies and those of other peoples which have led to war is best illustrated by comparing the dams we have built to make our country more livable and productive with the lines of fortifications and the network of air-raid shelters which have made nightmares even for Mars of the public works programs in some sections of the world."

HIGH PRESSURE STEAM CAPACITY ordered by Utilities in 1939

Because the units tabulated on the opposite page represent a very substantial part of the high-pressure capacity ordered by the Utilities since January 1, 1939, they may be regarded as presenting an up-to-the-minute picture of present and near-future trends in central station steam practice. Some points of particular interest in connection with these units are

1. They are all of the bent tube type which during recent years has repeatedly demonstrated its superiority in meeting the difficult circulation and steam quality problems incident to high pressures and high rates of output.

2. The continued acceptance of both dry and slagging bottom furnaces to adequately meet the requirements of a wide variety of fuels is evidenced by the fact that of the 21 units listed, 8 are slag bottom type and 11 are dry bottom. The other 2 units are stoker fired.

3. The versatility of the modern furnace in handling a variety of fuels is found in the fact that 9 units are designed to use two or more fuels. In two cases, the use of three fuels is contemplated.

4. Corner firing, an exclusive C-E development, continues to find wide approval, and 15 of the 19 units listed to burn pulverized coal, gas or oil, are equipped for this method of firing. All of the slagging furnace units are corner fired.

5. All but four units are equipped with by-pass dampers for superheat control. This method has proved itself to be simple, practical and effective.

A common characteristic of these 1939 C-E high pressure units is their conformity to well-established design principles. Although they embody various detail improvements, based upon the vast experience Combustion has had with the operation of high-pressure boilers and related equipment in recent years, all major aspects of design have long since passed the experimental stage—have been proved in service. Consequently, these new C-E units can be depended upon to meet the difficult operating conditions imposed by modern high-pressure practice and to yield a maximum return on investment.

You will want your 1940 steam generating units to give you the best economy that can be justified for your conditions, combined with high availability so that you can obtain full economic benefits without interruption other than that occasionally required for inspection and maintenance. C-E Units will assure you these results.

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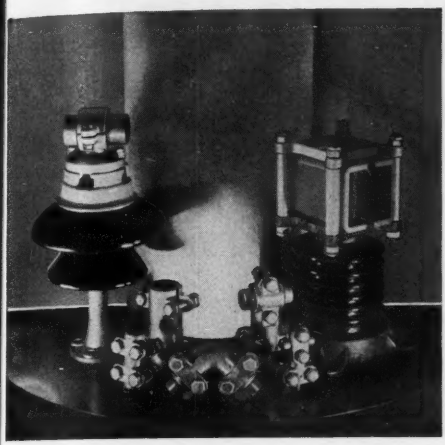

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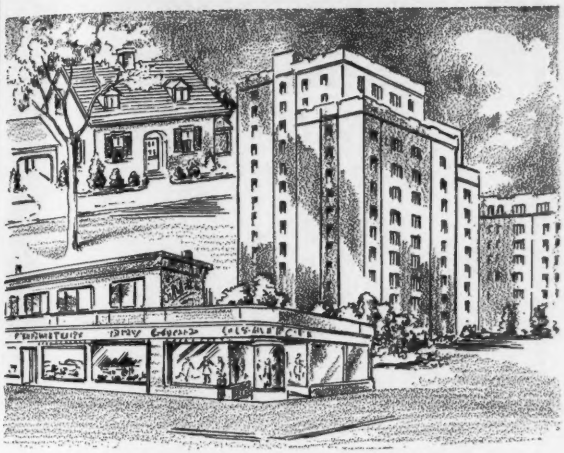

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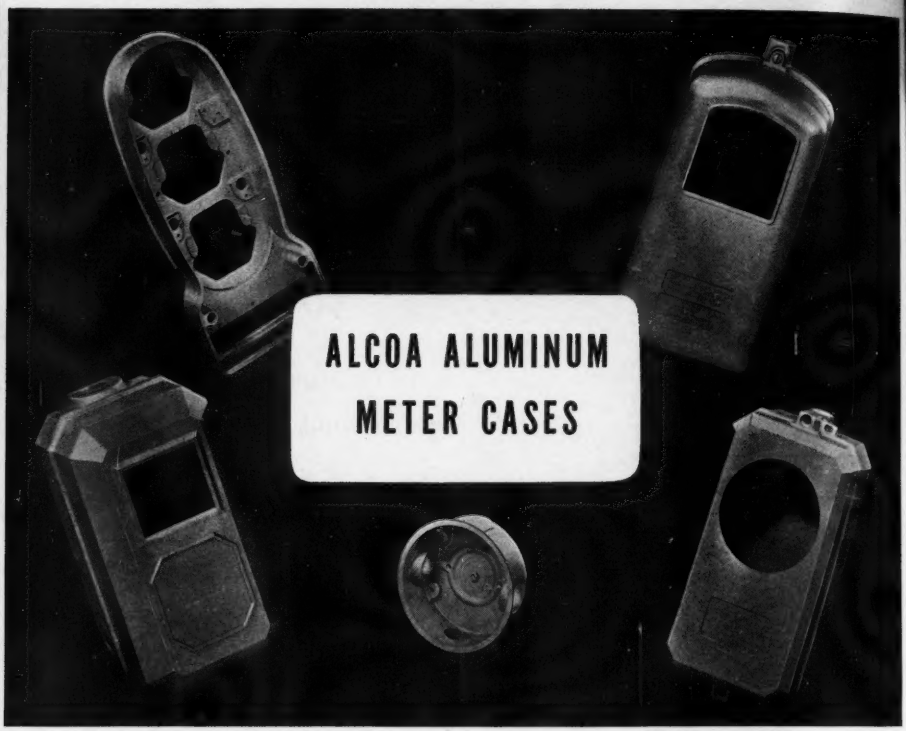

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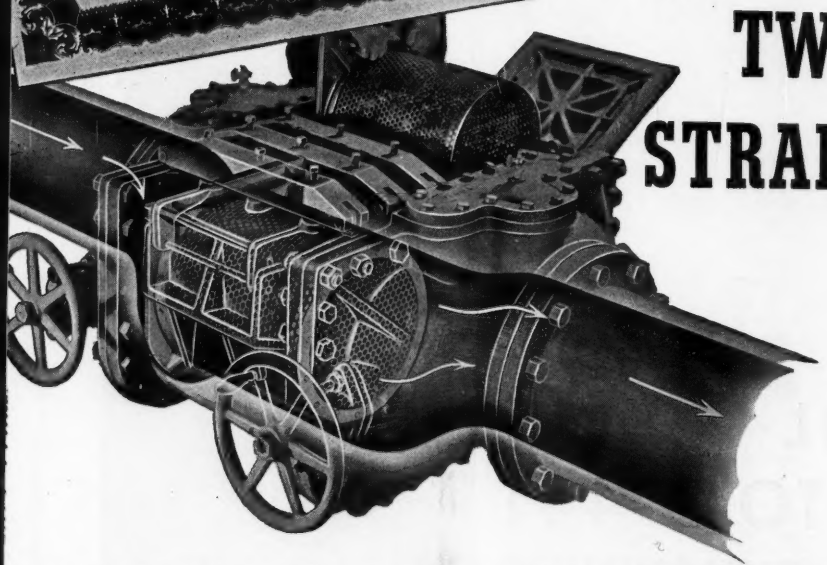

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Utilities Almanack

FEBRUARY

15	Th	¶ *American Institute of Mining and Metallurgical Engineers ends meeting, New York, N. Y., 1940.*
16	F	¶ *EEI Meters and Service Committee concludes meeting, Richmond, Va., 1940.*
17	Sa	¶ *New England Gas Association will hold annual convention, Boston, Mass., Mar. 14, 15, 1940.*
18	S	¶ *Texas Telephone Association will convene for session, San Antonio, Tex., Mar. 19–21, 1940.*
19	M	¶ *Texas Water Works Short School convenes, Texas A. & M. College, College Station, Tex., 1940.*
20	Tu	¶ *Missouri Valley Electric Association will hold joint-rural-sales conference, Kansas City, Mo., Mar. 19, 20, 1940.*
21	W	¶ *Missouri Valley Electric Association will hold engineering conference, Kansas City, Mo., Mar. 21, 22, 1940.*
22	Th	¶ *Oklahoma Telephone Association will hold meeting, Tulsa, Okla., Mar. 27, 28, 1940.*
23	F	¶ *Arkansas Engineers Club opens annual meeting, Little Rock, Ark., 1940.*
24	Sa	¶ *Kansas Telephone Association will hold convention, Topeka, Kan., Apr. 3, 4, 1940.*
25	S	¶ *American Water Works Association, Indiana Section, will hold convention, Lafayette, Ind., Apr. 4, 5, 1940.*
26	M	¶ *National Safety Council will hold committee meeting, Roanoke, Va., Apr. 8, 1940.*
27	Tu	¶ *Nebraska Telephone Association will convene for session, Kearney, Neb., Apr. 9, 10, 1940.*
28	W	¶ *Missouri Association of Public Utilities will hold convention, Excelsior Springs, Mo., Apr. 17–19, 1940.*

From a painting by Peter Helck

From Elsie Hafner

"Steam, Smoke, and Snow"

Public Utilities
FORTNIGHTLY

VOL. XXV; No. 4 FEBRUARY 15, 1940

"Steam, Smoke, and Snow"

A Look into the Future of Electric Light and Power

Thorough research and standardization of organization as well as of equipment and construction would be of material assistance, in the opinion of the author, in the solution of the problems with which the industry is faced.

BY RILEY E. ELGEN
CHAIRMAN, DISTRICT OF COLUMBIA
PUBLIC UTILITIES COMMISSION

LOOKING at a recent study of how the average American family spends its income (if it has any), we observe, for instance, that families in different economic levels annually expend sums tending to increase in amount directly as the income of the families investigated increases. For instance, in New York city the average family investigated spent $8.84 for the purchase of electrical equipment. For the purpose of the study the families were divided into three classifications:

1. Those where the breadwinner could not afford to spend as much as $400 annually for each person in his or her family. This group spent $2.99 on electrical equipment.

2. Those families where from $400 to $600 was spent on each member bought electric equipment totaling $7.88.

3. Those who had enough income to spend amounting to $600 or more on each person in the family group in-

vested $12.80 a year in electrical equipment. The order of importance of such investments was about one-half for a refrigerator; then come sewing machines, lamps, vacuum cleaners, washing machines, irons, and the like.

ON the other hand, families in these same economic levels but living out west of Chicago spent a far greater proportion of their income on electrical equipment. For instance, there the average spent per family for such purchases was $22.36 or nearly three times as much as in the East. The interesting thing for electrical appliance people to observe is that in the lowest economic group, those spending annually less than $400 per person in the family west of Chicago, was the largest gain over similar spending by comparable eastern families. Out there in the West the nether third spent $15.20, or more than five times as much of their income for electrical equipment as their eastern brothers.

The middle third, or the $400-$600 economic level of families, spent $22 annually on such purchases. This is a little less than three times what similar economic family groups spent in the East.

LASTLY, the upper crust of economic family groups, spending $600 or over on each person, spent $31.61 annually or a little less than two and one-half times what similar eastern families spent. Out West, the refrigerator was first on the list; it took more than 60 per cent of the annual expenditure. Washing machines came next with vacuum cleaners a close second. Electric stoves and sewing machines followed, with many less expensive appliances trailing.

"ALL right, so what?" you ask! I say to you that is a most significant set of facts.

"Why?"

Well, in the first place, in 1917-1918, when the government last sent out its multitudinous checkers-up on any such expedition, it did not find that you and I were spending our income on such things. At least not many of us were. Now 8 families out of every 100 are buying electric refrigerators and irons; 6 out of every 100 are buying electric vacuum cleaners, washing machines, and toasters, and so on. The list of electric appliances being bought is long. Now, in the second place, many, many families of the economic levels investigated had already purchased and paid for similar appliances. And lastly, in answer to your "So what," I say all this implies a highly developed and yet rapidly expanding field of use for electric current in the average American home.

Now remember we are only discussing families in income brackets below $3,000 annually. The big spenders on luxury electric equipment are not included; neither have I added the annual radio purchase expenditure which averages $5.63, including replacements, for the average western family, and $5.48, $3.78, and $7.81, respectively, going from the lowest to the highest income brackets. In the East the figures are $4.36 for the annual average family radio expense. These range from $3.45 for the lowest level, $3 for the middle third, and $6 for the upper crust's radio expense. When we add to these figures the cost of electricity used by these economic families investigated, we find a total in the average family budget of $38.20 in the East and $56

in the West for the purchase, maintenance, and operation of electrical equipment in the homes of wage earners and other families of modest income, and that description fits most of us to a "T" (tee).

And another thing to be remembered about this survey of family expenses is that in many instances the electrical devices were paid for and included in rental charges as regular features of the houses or apartments; and furthermore, in many instances, the cost of the current was included in the rent also. So that the average expenditure by renters for electrical equipment and current is below the true costs.

Sometimes one gets a bit disgusted with one's self after trying to save a few more cents on the annual bill for electric current for the dear old public and then one turns over to one of these surveys and finds such figures as outlined below.

Now we realize that it doesn't matter much how our public elects to spend its money. It is entitled to obtain its public utility service at the most reasonable rates consistent with good service, and that very idea, in the light of the growing acquisition of more and more home electric-using equipment, as shown above, makes conscientious regulators or electric operators lie awake nights thinking and thinking of where we are drifting and what manner of uncharted seas are ahead.

Obviously, if we are to keep this ever-increasing number and kind of electric appliances continuously supplied, at reasonable rates, with electric current, we must reappraise the future of the electric industry. It is obvious that in order to remain a sound business venture the level at which electricity is sold to the public must be sufficiently above the bare costs of production, transmission, and distribution to encourage a free flow of funds to supply the plant, land, and equipment essential to furnishing the service required by an ever-expanding public demand.

And since there is a definite downward trend of rates to attain these results, there must be just as definite a downward trend of costs of operation; so we must look ahead for possible ways and means to maintain a reasonably safe gap between outgo and income per kilowatt hour. A few observations born of rather common knowledge of certain possibilities of lowering the kilowatt-hour cost to the plant are:

City	*What the average family spends for Tobacco**	*What the average family spends for Electricity**	*Annual Average Family Income*
New York	$38.61	$29.91	$1,446
Minneapolis-St. Paul	25.04	28.46	1,448
St. Louis	30.56	26.53	1,529
Kansas City	24.96	19.52	1,398
Denver	24.21	25.54	1,500
Salt Lake City	13.50	34.77	1,273
Average	$26.15	$29.12	$1,432

*Bulletins 637 and 641, U. S. Dept. of Labor—Bureau of Labor Statistics.

(a) To standardize electric plant and equipment so as to take advantage of mass production methods. With that should go standard rules, methods, and practices of production, transmission, and distribution of electric current. Too, this should include standard methods and organization for the installation of standard plant and equipment. (b) Greater use of competitive bidding for contracts for construction of plant and equipment, materials, supplies, and services. (c) Greater advantage should be taken of the more general common use of available plant and equipment. One location just because it happens to be a different ownership from another ought not to suffer from lack of a supply of current when near-by facilities of a different company have it available, nor should there be duplications of investment. So long as existing excesses of current from near-by production sources are not exhausted, construction of additional production facilities ought to be deferred. (d) Plants should be kept more nearly modern. Reserves for depreciation ought to contemplate the actual replacement of outmoded plant and equipment at an earlier date than presently indicated.

NECESSARILY these four captions do not pretend to cover the entire field of all future possible economies of the electric utility business. Their commercial departments will have to recognize the inherent threat to the industry through the continued solicitation by manufacturers of electrical power generation engines for the purpose of sale to and installation by privately owned industrial power plants in various industrial fields, thus shutting out that segment of highly desirable power sales.

Now as to standardization of plant, equipment, materials and supplies, methods of construction and operation, organization, rate schedules, and service conditions: These are recognized as proper objectives by individual electric operating companies but have not, to any considerable degree, been carried beyond local plants.

As I write I am attracted to accounts, individual instances, in the electric light and power industry of a high degree of standardization of particular features. Before me is an account by G. H. Kieburtz [1] of the Puget Sound Power and Light Co. of "Trucks Geared to Specific Utility Duty." There is quite a detailed description of these service vehicles. However, I notice our local [2] power company has a different design for service trucks. I dare say you will find on the streets and avenues of a thousand communities, from the Gulf to Canada and from the Atlantic to the Pacific, trucks intended for precisely the same character of service but not possessed of the same qualities of rendering such service most economically.

OF course, standardization of service trucks of electric plant and equipment is merely illustrative. We might have used any one of thousands of other things of varying importance, speaking economically wise. There can be little question that in standardization, as outlined above, lies great opportunity for operating economies. The American Telephone and Telegraph Company, the top telephone holding company, recognized the truth of that conclusion many, many years ago. It has found much profit in standardization of everything that goes into telephone plant, equipment, service meth-

[1] *Electrical World* of Dec. 2, 1939, p. 44.
[2] Potomac Electric Power Company.

Special Designs of Electrical Equipment

"THERE is too much individuality in the electrical equipment found in the power stations of America. There ought to be little need for special designs of electrical equipment. The problems of delivering power to customers throughout America are not greatly different in so far as the mechanical means and necessities are concerned. It ought not to be necessary to continue to pay experts to make special designs."

ods, and, in fact, down to the conversation between its employees and its customers.

Another illustration of the effect of systematic research into the machinery of industry is the street car business. A decade ago, after street cars had almost become obsolete, that industry decided to follow the American Telephone and Telegraph research plan. A cool million was raised by transit companies all over the country and five years later the first modern street car, now to be observed in most large cities, was brought out. Had the transit industry brought out such a vehicle fifteen years earlier the more economical street car would not have been replaced so widely by the more expensive city bus. The transit industry would have been in better financial condition than it is today. However, it is now definitely on the upgrade again to its former top place in mass transportation.

THEN there was what people called the "decadent" gas industry until the American Gas Association[3] was entrusted by gas companies everywhere with the funds necessary to conduct the business of research and investigation into plant, equipment, methods, and whatever was essential to a betterment of the industry. Today the American Gas Association research work has this once decadent industry on the road to bigger and better things, financial and economic. Yes, and its renewed life is a definite threat to many electric expansion plans. Besides, gas is quite an economical competitor of electricity.

Then there is this so-called railroad "problem." A couple of years ago those who run the railroads suddenly awoke to the realization of the necessity for systematic, scientific research as a means to standardizing and modernizing railroads and providing them with the kind of plant, equipment, methods, and organization that would permit them to operate to greater advantage, financially and otherwise. That great

[3] See PUBLIC UTILITIES FORTNIGHTLY, Vol. XXIV, No. 8, Oct. 12, 1939.

twenty-six billion dollar industry, too, had complacently folded its hands in its ample lap and was inclined to smile cynically whenever some one suggested that your old jalopy and my old truck and our neighbors' home-made bus constituted a triple threat to what they regarded as their own business—furnishing American transportation. Well, most of that twenty-six billion dollar investment is now in some kind of a bankruptcy or other reorganization body. Yes, how the great have fallen! And they haven't landed yet. They are still descending in a long spiral, out of gas.

WELL, I suggested six years ago in this magazine that they ought to turn their operating problems over to an expert research organization and give them at least five million dollars a year to find out what a modern railroad ought to look like. I was besieged with language tending to prove that they didn't need any such organization as they were doing very well, and much more and stronger language of the same kind. However, I observed that several years later they did what I suggested. They still have not recognized that their problems are almost purely scientific ones to be solved by science and research, but they are coming round to it fast.

Next to rail transportation in importance we have this other great public service business, the electric light and power industry. It is doing something in the way of standardization of its plant and equipment. But the work is not under the direction of any central organization charged with the duty of the development of systematic research. Yes, it is true the American Standards Association is doing an excellent job on mighty little money, for all industry. It is doing a particularly good job for the electric industry. So far it has been able to promote 82 different electric standards through the coöperation of the National Fire Protectors Association, The Underwriters' Laboratories, American Institute of Electrical Engineers, American Institute of Architects, The National Electrical Manufacturers' Association, and literally dozens of other groups whose interests reach into the field of standardization. The 82 standards vary anywhere from safety codes, dry cells and batteries, pole line material insulators, and the like, to heavy electrical machinery, and what not.

NO, I don't mean to say nothing is being done in the direction of standardization of electric plant and equipment! What I do say is that if all the recognized forces working for standardization of electrical equipment had conducted the most exhaustive research into the subject of generating equipment specifications and rendered their unanimous recommendations, there would still be no compelling force to require the use of the results of those conclusions.

We had the same conditions on railroads where I used to be engaged as an engineer. We had our American Railway Engineering Association, wherein we adopted standards of this, that, and the other; we had our Master Car Builders' Association, and so forth, and so forth, but when a new chief engineer took office, his reactions were exactly like those of a new Postmaster General when he takes office; that is, there had to be a completely new set of

Postal Route Maps of the United States bearing the new Postmaster General's name, and that has been true of all Postmasters so far. So with the new chief engineer of the railroad. He has to have a new set of engineering standards for the railroad, each one bearing his own name in approval thereof.

There is too much individuality in the electrical equipment found in the power stations of America. There ought to be little need for special designs of electrical equipment. The problems of delivering power to customers throughout America are not greatly different in so far as the mechanical means and necessities are concerned. It ought not to be necessary to continue to pay experts to make special designs. Naturally when the special designs are reduced to a minimum in favor of standards, the rate base will not grow so fast.

Now all that has been said with respect to the plant accounts applies with equal force to materials and supplies necessary to keep on hand. In fact, the greater the degree of standardization attained, the lesser amount of cash it is essential to have tied up in materials and supplies. If the truth of that assertion is admitted, then it follows that there is a lesser amount of inactive capital in the business.

Now going to standardization of the methods of construction and operation, here again we find much different procedure in different companies. On the other hand, no matter where you go in this country you will find that every process used in the construction and operation of the communications business by telephone has been standardized and men follow the same plans of doing similar work wherever it must be done. And it stands to reason that it ought to be possible to dig a hole for a light pole and to erect the pole in it according to some standard plan. There is a right way to do everything. Finding the right way to put an automobile together has contributed largely to making it possible for some thirty-one million American families to own and operate them, and contributed to establishing the greatest of modern industries. Finding the right way of producing kilowatt hours will go far toward making the electric light and power business even greater than it is.

Standardization of operating organizations of electric light and power business ought to contribute to greater efficiency and economy. There should be little necessity for any materially different type of operating organization in any two electric light and power companies of comparable ramifications. Certainly, furnishing electric

¶ "Finding *the right way to put an automobile together has contributed largely to making it possible for some thirty-one million American families to own and operate them, and contributed to establishing the greatest of modern industries. Finding the right way of producing kilowatt hours will go far toward making the electric light and power business even greater than it is.*"

service to a hundred thousand household customers in one city ought not to require a materially different organization from that performing the same type of service for a hundred thousand in another city. And yet there is little or no similarity found in operating setups of comparable electric companies.

Finally, as to rate schedules, and service conditions furnished under them, here again there ought to be far greater coöperation between the industry and regulation to the end that the most desirable type of schedule may be adopted as a standard throughout the nation. Uniformity in schedule making will tend to simplify and lessen the cost of billing customers for service. It will also take much misunderstanding out of the business. There is hardly any reason for one city to have entirely different types of rate schedules from a neighbor city.

GOING now to the matter of the greater use of competitive bidding for contracts for the construction of plant, equipment, materials, supplies, and services, here again the industry is laboring under several prominent disadvantages which ought to and can be eliminated to the material benefit of it. It is quite well known that those who made merry with the electric light and power business once were inclined to yell "Power Trust" on the slightest provocation. The ability to be able to speak convincingly of the horrors perpetrated by the mythical "Power Trust" was the vehicle whereby many have risen to places of trust and power in legislative halls throughout the land. Lately the "Power Trust" appears to have fallen into disuse as a political "Aladdin's Lamp."

And in order to keep mystery out of kilowatt hours it is growing more and more necessary to reduce plant costs to rock bottom and make them understood. The universal use of competition in obtaining those things essential to the construction, operation, and maintenance of electric light and power plants will tend to bring about a greater confidence on the part of the public in the industry. The common knowledge of the adoption of competitive bidding for those things, the costs of which are important factors in both the rate base and the operating expenses, will reassure the public.

Again, working out coöperative plans for the general use of available power production facilities is becoming a matter of serious concern to power companies everywhere. We have heard much of the British transmission network as an example of what ought to be done in this country. There power production facilities are pooled. The Federal government is actively promoting this idea.

ONE serious obstacle in this country to the effective operation of such a network lies in the fact that periods of peak demands for current in a given area as a rule do not vary sufficiently for one company to utilize the excess power production of its neighbors. Furthermore, few power plants are built much beyond their own immediate maximum needs.

On the other hand, a careful survey ought to be made by adjacent operating companies of the possibilities of the interchange of power even beyond the constructed facilities. For instance, Company A is faced with prospective demands for more current than its ex-

isting generating equipment will be able to supply. Company B, a neighbor, is faced with the same problem. A 50,000-kilowatt unit will meet the combined demands, yet the economies of each case when dealt with separately require the construction of two 50,000-kilowatt units. Of course, eventually both will have to be built but not, however, until needed. So here's a field of thought that appears to offer the industry opportunity for greater study. The public interest lies in keeping the rate base down; the private interest would appear to coincide with that.

THEN we come to the matter of keeping electric light and power plants more modern, keeping them more nearly abreast of the latest developments, keeping obsolescence to a minimum. This requires the annual accumulation of adequate reserves for replacement of worn out, obsolete, and outmoded plant and equipment promptly so that economies inherent in modern ones may be made available earlier than usual. Of course, it has been evident during the past decade, even to primary school children, that this matter of power has become almost a political subject. There can be little question but that the investing public, because of this almost continuous wrangle, has been hesitant about handing any more of its savings over to the private companies for investment.

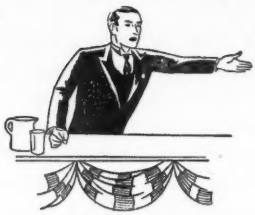
So, finally, let's stop all this hullabaloo about power and get down to brass tacks on what we, as the public, are entitled to and want and whom we want to serve us, as well as how we are to be served.

This matter of the cost of kilowatt hours is nothing mysterious. Let's go after it in a thoroughly scientific way. Turn it over to informed researchers, competent men versed in the solution of power problems, and let's map out and diagram a United States power program so everybody will know just where the government gets off and the private electric light and power industry gets on.

Organized Labor and Federal Control Of Railroads

"ORGANIZED labor would have little to gain from government control of the railroads. Their ability to deal freely with private management in settling their private problems of wages, hours, and working conditions would largely disappear, and it is well known that wages paid by the government to its employees are on the low side compared with the favored position which railroad labor has been able to obtain for itself under private operation. Labor has also recently discovered that it has no right to strike against the government. Accordingly, railroad labor, if it is foresighted, will be very slow in pressing for increased wages, which might prove of temporary advantage in any event, and which, through the draining of the carriers' resources, would be a further step toward government control."

—EXCERPT *from Report of Railroad Securities Committee, Investment Bankers Association of America.*



Will Rising Production Costs Hurt Utility Investors?

The author does not anticipate any upsurge in costs in the years immediately ahead, but, looking farther, considers how the companies are situated to meet a possible rise in operating costs if and when it occurs. Need of rate adjustments as nearly automatic as possible.

By FERGUS J. McDIARMID

Your public utility bond is frequently a fine example of the engraver's art which is not lacking in aesthetic appeal. On the front is often depicted a beautiful lady dressed to a greater or less extent in what we take to be the ancient Greek equivalent of negligee, and somewhat more generously proportioned than the coupon rate which it is customary to attach to such bonds nowadays. As often as not this very charming creature appears to be engaged in the singularly futile process of caressing a dynamo, a circumstance which must be strictly a figment of the artist's imagination, as we have never seen or heard of the like taking place in any of the many power stations which we have had occasion to visit. However, hope dies hard.

Struggling past this intriguing apparition down into the much more prosaic printed matter below, it appears that the bond is not meant to be primarily a work of art, but rather a promise to pay money. The columns of attached coupons are individual promises to pay interest at regular intervals over the years ahead. Such interest on utility bonds and dividends on utility stocks can only be paid out of net earnings. The owners of such securities can only seek their just due out of what is left in the treasury after wages, fuel, and other material costs and taxes have been paid, and something has been put aside to cover depreciation. That is why the most serious of all threats to the continual health and happiness of the public utility security holders of America is that increasing expenses will encroach upon earnings until the investor is frozen out.

The outbreak of war in Europe, carrying with it the threat of rising costs, has focused attention on this aspect of utility operations. That it is not entirely a theoretical aspect is proven conclusively by the history of the rail-

roads. Many of these have in the course of a single generation been transformed, partially at least owing to the increased expense of doing business, from profitable business enterprises into privately endowed public charities. Their investors now know that the faithful performance of a public service alone will not pay bond interest and that a streamliner will run just as well over a bankrupt road as over a solvent one. They have learned the fallacy of trusting too implicitly in the theory that a fair rate of return will always be permitted to be earned by an enterprise devoted to the public service. Their experience has proven that when the investor has been crowded on to the mourner's bench by the pressure of rising costs, the public which goes right on using the facilities which he has provided can be surprisingly complacent about his plight.

It is altogether natural that the utility investor, apprehensive as to the effect of rising costs on utility earnings, should seek a clue to the future in the operating results of the industry during the inflationary period accompanying the last World War. C. W. Kellogg, president of the Edison Electric Institute, stated not long ago that during that period the price of coal advanced 172 per cent and hourly wage rates rose 105 per cent. The impact of such an increase in costs upon an industry whose selling prices suffer from rigidity might be expected to produce some startling results. It was, therefore, with a certain sense of expectation that we got the old utility financial manuals down from the shelf where they had not been disturbed for years.

A manual dealing with the finances of the American public utility industry, which is as much as twenty years old, has an air of antiquity about it which is hardly possessed by any other type of book of similar age. Turning the pages of such old volumes helps to restore a sense of perspective which is absolutely essential for the intelligent supervision of investments, but which is only too apt to grow dim. It helps one to see the woods in spite of the trees. It drives home the fact that twenty years is a very considerable span in the life of an American industry.

Here was an electric utility serving a large city whose revenue and plant account had more than tripled in that interim and whose power sales had increased at an even faster rate. Many large systems of today existed only as small unconnected properties twenty years ago. However, it was possible to select a number of large utilities whose financial fortunes from 1914 through 1920 could be traced on a comparative basis. The growth of these companies during that period was a natural one and was not augmented by the acquisition of complete utility properties.

Although index numbers usually have a rather sodden statistical atmosphere about them which encourages people to go to sleep, at times their use is difficult to avoid. They have been used in the accompanying tables to show the growth in both gross revenue and net earning during the period under consideration. In order to eliminate the effect of variations in depreciation policy, net earnings after operating expense, maintenance, and taxes, but before depreciation and fixed charges, were considered.

The operating ratios presented in the tables show the proportion of operating revenue absorbed by operating expenses, maintenance, and taxes.

During the period under observation, operating revenues of the selected utilities increased at a very rapid rate. However, operating expenses and taxes shot up even faster, with the result that net earnings grew at a slower pace and, in the case of the artificial gas utilities, actually declined.

Of the four groups of companies studied, the hydroelectric utilities seemed to come through in best shape. This was not due to the fact that they experienced a lower proportionate increase in costs, but because starting with a low operating ratio, and enjoying a rapid increase in business, a given percentage increase in expenses was a less serious matter with them. In fact, they were even able to show a small increase in the rate of return earned on their undepreciated property accounts.

The steam electric companies were slightly less fortunate, mainly because their higher operating ratios presented a greater exposure to the impact of rising costs. Thanks to the tremendous upsurge in their business and to increasingly efficient operation, they were able to prevent the rate of return being earned on their increasing plant investment from slipping.

The record of the gas companies illustrates the effect of sharply rising costs upon a branch of the utility industry which was handicapped by a relatively high operating ratio, and which had reached a point in its life cycle where its rate of growth was only moderate. By 1920 the six companies studied had, as a group, ceased to earn any net return on their investment after allowing for proper depreciation.

Net earnings of the telephone company declined from 8.6 per cent of the undepreciated property account in 1916 to 6.1 per cent in 1920.

TABLE I

TREND OF EARNINGS OF SELECTED UTILITIES 1914-1920

Eight Large Electric Utilities Generating Power by Steam

	Operating Revenue	*Net before Depreciation*	*Operating Ratio*
	(*Indices of Growth*)		
1914	100	100	57%
1916	126	119	57
1918	156	116	66
1920	221	149	70

Six Electric Utilities Generating Power Largely by Hydro

	Operating Revenue	*Net before Depreciation*	*Operating Ratio*
	(*Indices of Growth*)		
1914	100	100	44%
1916	126	119	47
1918	160	133	53
1920	239	189	56

Six Large Artificial Gas Utilities

	Operating Revenue	*Net before Depreciation*	*Operating Ratio*
	(*Indices of Growth*)		
1914	100	100	70%
1916	102	99	71
1918	123	46	89
1920	163	23	96

American Telephone and Telegraph System

	Operating Revenue	*Net**	*Operating Ratio*
	(*Indices of Growth*)		
1914	100	100	
1916	120	128	
1920	199	124	63%

*After depreciation but before fixed charges.

It would probably be a mistake to assume that price levels in the years immediately ahead will follow the pattern of the years 1914 to 1920. As compared with that earlier period, the world is now divided into a group of more or less insulated economic compartments between which price changes may be slow to transmit themselves. Credit has almost ceased to flow across international boundaries. In the meantime the enormous productive capacity of the United States together with the restricted nature of outlets abroad will probably continue to have a depressing effect on our internal prices—that is, unless we ourselves become actively engaged in war and begin to give away and shoot away wealth on a huge scale under government auspices.

Concerning the possibility of rising costs in this country, a more potent cause for concern than the present war is the badly unbalanced state of the Federal budget. Such chronically unbalanced budgets, accompanied, of course, by rising public debts, appear to be an almost universal fiscal disease of our age, and the elimination of wishful thinking compels us to recognize that no reversal of this trend is in sight.

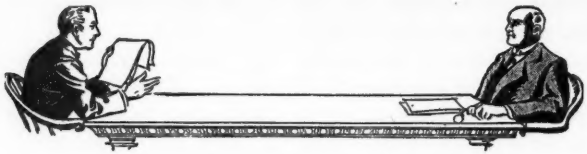
Although this malady is as old as civilization, it was rare in the United States prior to 1931. Both historical precedent and simple mathematical deduction prove that, if not checked, it leads inevitably to a decline in the value of the currency unit. Cases in history where it has been successfully checked after getting a bad start are not plentiful. How many of us, therefore, wonder how many loaves of bread one of our social security dollars will buy when we actually start collecting them twenty-five or thirty years hence?

Such an admittedly speculative process of deduction leads us to expect no upsurge in costs in the years immediately ahead. However, for the longer pull, as the inflationary effect of unbalanced budgets and rising debt takes hold, a rising price level is the likely outcome. Unbalanced budgets also carry with them the constant threat of an increased tax burden.

How are the utilities situated to meet such a rise in operating expenses if and when it does materialize? In the period following 1914, expanding usage of the service together with increased operating efficiencies tended to offset rising costs in the electric industry at least. Throughout the entire history of that industry these factors have served to offset constantly decreasing rates.

There must, however, be a limit to this process. Engineers tell us that our most efficient steam generating stations are already pressing the ceiling of practical operating efficiencies. It is likewise not to be expected that the electric and telephone industries will ever again experience the multiplication in customers and revenue which was theirs during the first thirty years of this century. During this period new customers were being added at a more rapid rate than can ever happen again, and the operating revenues of the electric industry at least had a habit of doubling every five to seven years.

It is not intended to infer for a moment that the end of growth in this industry is in sight. For a long time yet no doubt there will be a large demand for additional generating capac-



Fuel Cost of Steam-generated Power

"ANALYSIS of the operating results for 1938 of 12 large electric utilities, generating their power almost entirely by steam, revealed that while fuel costs made up 64 per cent of the cost of their steam-generated power, such fuel cost was equivalent to only 20 per cent of total operating and maintenance expense."

ity, new and larger substations, and more power lines both above and below ground. There is every reason to believe that kilowatt-hour sales will continue to mount for as far into the future as it is possible to visualize. However, such additional kilowatt hours will probably be sold on a decreasing profit margin and on an increasingly competitive basis. In the household they will be consumed to a large extent by heat-producing appliances in competition with other fuels. In industry the most impressive scope for increased usage of electric power appears to be in connection with chemical and metallurgical processes where a low price for current is usually necessary to permit its use. Probably the most that can be expected from kilowatt hours thus consumed is that they pay their cost of production together with a not overly generous return on the additional investment which makes their delivery possible.

Turning from speculation to cold facts, certain trends may be discerned in the operating results of the electric utility industry which are rather disquieting. The operating ratio for the industry as a whole (the proportion of gross operating revenue spent on operating expenses and maintenance) ended a long decline in 1932 and thereafter turned upward. It rose from 35.8 per cent in 1932 to 37.7 per cent in 1938. This change is small, it is true, but if taxes be included as an expense the trend becomes more striking. Taking taxes into account, the corresponding operating ratio rose from 47.7 per cent in 1932 to 54.4 per cent in 1938, a deterioration which cannot be entirely ignored. In spite of a 46 per cent increase in the amount of power sold between those two years, and a 20 per cent increase in operating revenue, the net earnings of the industry available for the investors increased hardly at all.

THESE results are in conformity with the recent year-end statement of the Edison Electric Institute's Mr. Kellogg to the effect that whereas electric output in 1939 exceeded by 38

per cent that of the boom year 1929, net earnings of the electric utilities available for return on investment decreased $37,000,000 in the interim. According to Mr. Kellogg this was the equivalent of no return whatever being earned on some $3,500,000,000 of capital investment made by the industry during the last 10-year period.

Such tangible evidence would seem to indicate that the electric utility industry has reached and passed a peak in the rate of return which it is able to earn on its investment. This trend does not instill optimism when contemplating the probability of rising costs ahead.

Somewhere along the line a point will doubtless be reached where such rising costs can be offset only by rate increases, if the investor is not to suffer badly. A quick upshoot in operating costs, producing a sudden crisis such as happened during the last war period, would doubtless bring about some upward adjustment in rates. More to be feared from the investor's point of view is a slow rise in costs, including taxes, such as would tend to whittle away earnings over an extended period of years without bringing about a show-down. We are not so sure but that this very thing has been taking place since 1932.

In the face of such a process of attrition operating on earnings, what is likely to be the attitude of the regulating authorities? The recent decision of the supreme court of Illinois to the effect that 5 per cent return on the property value of Peoples Gas was not confiscatory may offer a clue. In an article published in the FORTNIGHTLY some two years ago we ventured the opinion that the low interest rates at which utilities were able to refund their senior securities would probably have a depressing effect on the allowable rate of return on their investment. We questioned whether the zeal shown by the utilities in forcing constantly lower rates of interest on the holders of their senior securities would do these utilities any good in the long run. We still question it.

IN the Peoples Gas Case it was alleged that since the company had proved its ability to refund some of its bonds on a 4 per cent basis, a 5 per cent overall return was not confiscatory. According to this reasoning, how low a rate of return could be regarded as nonconfiscatory in the case of an electric or telephone utility which had proved its ability to refund bonds on a 3 per cent basis? Also bear in mind that some electric utilities appear to be earning a high rate of return—sometimes as high as 8 or 9 per cent—on their electric properties, if the value of these properties be taken as the original cost depreciated, say 15 per cent.

Drawing together all of the strands of evidence, and attempting to arrive at a conclusion divorced as much as possible from wishful thinking, it would seem that the level of electric and probably telephone earnings as a whole can decline a considerable distance below present levels before there can be much hope of relief through rate increases. This, of course, does not prevent a different view being held in the case of individual companies.

The cumbersome and slow-moving nature of the machinery through which such rate adjustments may be brought about is another of the hazards which the utility investor must face. A start

toward remedying this situation has been made in New York and Pennsylvania where temporary rates may be put into effect on short notice by order of the public service commissions. Presumably, if rates may be lowered in this way, it is to be hoped that they may be raised through the same process when equity demands it. It seems to be highly desirable, from the investor's point of view, that such machinery to make rate adjustments almost automatic be set up elsewhere as soon and as widely as possible. If this be delayed until it becomes apparent that adjustments are likely to be in an upward direction only, the idea will probably be more difficult to put over than otherwise.

One must also consider whether or not a rate increase would serve the desired purpose of increasing net earnings. This will depend upon the competitive position of the industry and the position occupied by the service rendered in the design for living of the consumers. Is it something for which a suitable substitute exists or something of which the customers might choose to consume less? At the present time the electrical industry could no doubt increase rates to nearly all classes of customers and earn more money thereby. This might not always be true as electric service extends into increasingly competitive fields or as other competitive industries come into the picture.

STEAM-electric utilities have some backlog of protection in the coal clauses contained in many industrial power contracts. Through such clauses an increase in the cost of coal may be reflected in higher rates for industrial power. Analysis of the operating results for 1938 of 12 large electric utilities, generating their power almost entirely by steam, revealed that while fuel costs made up 64 per cent of the cost of their steam-generated power, such fuel cost was equivalent to only 20 per cent of total operating and maintenance expense. Bear in mind also that power sales to industry produce only about one-quarter of total electric revenue, although they account for nearly one-half of all power sold. It must be evident, therefore, that such coal clauses, although a step in the right direction, are only a partial hedge against the eventuality of rising costs.

TABLE II

MARGIN OF EARNINGS

Company	After Bond Interest	After Preferred Dividends
	(*Expressed as % of Operating Expense Including Maintenance*)	
A	33%	*
B	61	51%
C	125	65
D	19	12
E	300	195
F	13	*
G	107	82
H	22	*

*No preferred stock outstanding.

As matters now stand the utility investor might as well realize that the possibility of rising costs carries with it a type of threat to public utility earnings against which no complete and all-embracing safeguard exists. However, this is no reason why an intelligent job cannot be done in selecting those utility bonds and stocks which are best able to take it on the chin. The holder of any particular public utility security will do well to ask himself this question, "How much can the cost of running the business increase without impairing the ability of the utility in which I have a stake to earn the interest on my bonds or dividends on my stock?" In other words, what kind of a safety margin do these securities have against the contingency of rising costs, and how does this safety margin compare with that of other utility securities?

THIS problem should be approached systematically on a comparative basis. It can be done by expressing the amount left over after paying bond interest or preferred dividends — the so-called safety margin — as a percentage of operating expenses including maintenance expense. This ratio indicates the proportionate rise which may take place in such operating expenses before the company ceases to earn bond interest, or preferred dividends. It is, of course, a highly artificial figure for it assumes that no change will take place in operating revenue, in taxes paid, or in the allowance for depreciation. Nevertheless, when used on a strictly comparable basis it is as good a criterion as any.

We recently had occasion to work out this ratio for a large number of utilities, but only a few representative cases will be presented here. The figures are based on results for the year 1938.

If the probability of increased taxes is considered by expressing the earnings margin as a percentage of operating expense, maintenance, and taxes, the ratios are reduced by about one-third. See Table II, page 210.

If these ratios prove anything at all, it is that it is extremely difficult to generalize with respect to the effect of a rise in costs on utility securities. A proportionate expense rise which would be fatal to the security holders of Companies D or F (Table II), would be of little moment to those of Company E.

THE effect of such an increase in expenses depends to a large extent on the type of business done. Companies A and B (Table II) are electric utilities generating their power very largely by steam. Because of different operating conditions Company B seems to be in much the better condition to withstand a rise in costs. In the case of this company a 51 per cent increase in expenses would be equivalent to wiping out the entire safety margin of the preferred stockholders, or all of the earnings available for the common stock, whichever way you prefer to look at it.

Company C is a large electric utility serving an extensive area at retail and developing 97 per cent of its generated power from falling water in 1938. Such a company is much less vulnerable to rising costs than is a steam-electric utility. Company C has the additional advantage of a conservative capital structure. Its senior securities appear to be unusually well protected against rising costs.

Safety Margin of Securities

"THE holder of any particular public utility security will do well to ask himself this question, 'How much can the cost of running the business increase without impairing the ability of the utility in which I have a stake to earn the interest on my bonds or dividends on my stock?' In other words, what kind of a safety margin do these securities have against the contingency of rising costs, and how does this safety margin compare with that of other utility securities?"

In the case of Company D, the margin of excess earnings appears pretty slim when measured against operating expenses. This company, in addition to operating a fully integrated steam electric utility, distributes natural gas and operates a large local transportation system. The gas and street car businesses, while accounting for nearly two-thirds of the operating expenses, produce less than 30 per cent of net earnings available for the investors. A company of this type appears peculiarly vulnerable to an inflation in operating costs. Very often the condition of a relatively unprofitable gas or transportation business is such that an increase in rates would not have the desired effect of increasing gross revenue. A danger exists that such a division of the business, which does little more than break even when costs are moderate, might actually become a drain on electric earnings in the face of rising costs.

CLOSE to the other end of the scale is Company E. This company is a generator of hydroelectric power, and it sells nearly all of its output at wholesale under long-term contracts. Utilities of this type are almost in a class by themselves in the security which they can offer the investor who is apprehensive as to the effect of an increasing level of costs.

To such an investor the bonds of Company F would hold forth little attraction. This is an artificial gas utility characterized by a rather high operating ratio. The earnings record of such companies during the last period of inflated costs does not inspire confidence.

Company G is a water company and its bond interest and preferred dividends appear relatively well protected.

Company H is an important operating subsidiary of the American Telephone and Telegraph System. Its relatively low margin of earnings protection after bond interest may be considered as partly offset by the generous allowances of such companies for maintenance and depreciation.

Anyone who sets out to chart the effect of rising costs upon public utility earnings runs a good deal of risk. To minimize this risk we have leaned as directly as possible upon facts and have made only short excursions into the realm of speculation. If the reader desires to use the factual material presented as a springboard for more extended plunges into the realm of prophecy, that is up to him.

We have pointed out that in the last period of sharply inflated costs, utility earnings, at least in the electric and telephone fields, were buoyed by an enormous growth factor in the business. An equivalent growth factor is not likely to be present in another such period. Owing to the unbalanced Federal budget, some future inflation in prices is likely. There is a great deal of variation among individual utilities in their vulnerability to such an increase in operating costs, and an opportunity for selection on the part of the investor exists.

In the meantime, it is highly desirable that machinery be set up without delay to make rate adjustments as nearly automatic as possible in the face of changing price and wage levels. Unless this is done we have a haunting fear that some of those very artistic pieces of paper known as utility securities may become chiefly useful as wall paper.

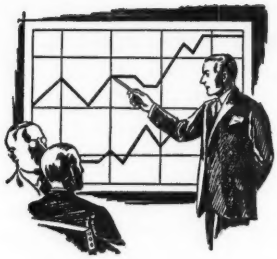
Such wall paper comes high, for according to our calculations it would take at least a hundred thousand dollars worth of utility bonds to paper even a small room.

Good Thing This Isn't Contagious

For several years prior to the recent outbreak of war in Europe, the utility companies in and about Montilly-sur-Noireau, France, had quite a problem on their hands. Periodically, the electric lights and even the telephone service would go out. Invariably the emergency repair crews found wires cut in such a way as to indicate deliberate sabotage. This kept up until the police became sure that the damage was being done by someone who had an obsession against electric wires.

After considerable sleuthing, suspicion focused upon one of the most respectable gentlemen farmers of the district, Eugene Bonnesoeur. There was a tragic climax, however, before the case was cleared up. Marcel Payen, a linesman, was sent out to repair one of the breaks, but when he climbed the pole he was fatally wounded by a rifle shot. Bonnesoeur, who did the sniping, then rushed up and carried the unconscious man to the nearest police station where he confessed that he had shot Payen in a fit of rage when he saw him repairing the wires.

The reason for Bonnesoeur's antiutility mania was his hatred for things electric, which grew out of an unfortunate accident some years before when his little son was electrocuted by a fallen live wire. Bonnesoeur was placed in a hospital for the criminally insane, where attendants have orders never to leave him unguarded near an electric light or any other appliance.



Temporary Rates—Good and Bad

Possible dangers and abuses in the fixing of temporary charges pointed out by the author, although he regards their administration, if fair, an advantage both to the utilities and the public.

By J. HARRY LaBRUM

Utility executives interested in the proverbial ounce of prevention may save many thousands of dollars in litigation costs, and millions, perhaps, in rate revenues within the next few years by careful study at this time of the trend toward temporary rates. Legislation for the establishment of temporary rates had its origin in 1907, but it was not until 1933 that new methods began to be generally adopted. The new method began with the Nebraska public utilities act of 1907 which provided for the imposition of temporary rates by the commission in emergencies. This was followed in 1933 by the Illinois public utilities act which provided authority for the commission to impose temporary rates pending hearings to determine fair permanent rates. Since then New York, Virginia, North Dakota, and Pennsylvania have taken similar action.

The urge for more power being universal among public officeholders, it is a foregone conclusion that other states will follow the leads given by the legislatures of the states mentioned and adopt the new temporary rate plan. An understanding of advantages and drawbacks in temporary rates, of variations in their provisions for recoupment if the temporary rate is found to be too low, and in methods of arriving at these rates should, therefore, be of value in formulating utility policy and influencing sound legislation and its interpretation. This is an important consideration also in any projected long-term plan of capitalization, as well as in the planning of mergers or consolidations of utility properties.

One or both of two reasons are put forth by proponents of temporary rates in advocating the enactment of

legislation. The first is the argument that existing rates are too high. This often has its source in consumer petitions for reductions. The purpose of the temporary rate when this is the only reason for its application is to provide immediate relief to consumers pending hearings to determine fair permanent rates. The second reason is the contention that, though there may be no objection to existing rates, lower ones would bring about increased consumption without reduction in total revenues.

The right to impose temporary rates cannot be doubted. Long before there was any suggestion of present procedure, commissions in the various states established what they called interim rates to protect the utilities in particular situations and under special circumstances. At the outset these rates were generally increases to take care of postwar inflation and rising wages. There were very few instances of reductions. When the commissions in more recent years attempted to bring about reductions by imposing temporary rates, the utilities appealed to the courts.

In the case of Prendergast *v.* New York Teleph. Co.,[1] the Supreme Court decided that so-called temporary rates were final legislative acts for the period they were in effect, but where no limit was fixed as to their duration, the fixing of such rates should be enjoined. Mr. Justice Sanford, who wrote the opinion, implied that such rates might be constitutional if some provision were made so that the rates thus fixed did not have this finality. The New York legislature finally in 1934 enacted temporary rate and recoupment provisions in its Public Service Law. The constitutionality of these provisions was upheld by the New York Court of Appeals in 1936.[2] Here the court held that the recoupment provisions constituted an offset to any confiscation of property resulting from the imposition of temporary rates.

In the Beaver Valley Water Company Case[3] in Pennsylvania, a statutory court determined that the order of the commission fixing temporary rates was not such a final legislative act as could operate to confiscate the company's property in any permanent sense, solely because of the fact that upon final determination the water company might recoup its loss through a temporary increase if the prescribed final rates proved to be higher than the temporary rates. "We accordingly hold," said Circuit Court Judge Maris, "that the order fixing temporary rates for the water company . . . was not a final legislative act . . . ." The court evidently ignored or gave an unusual interpretation to the decision of the Supreme Court in Driscoll *v.* Edison Light & P. Co.,[4] in which the majority opinion reaffirmed the fair return on fair value rule of rate making and gave no evidence of changing the criteria on which validity of rates was to be determined. The court went beyond the requirements of the case before it and impliedly held that there were no limitations as to duration or amount of temporary rates if recoupment was afforded.

[1] 262 US 43, 67 L ed 853, PUR1923C, 719.

[2] Bronx Gas & E. Co. *v.* Maltbie (1936) 271 NY 364, 14 PUR(NS) 337.

[3] Beaver Valley Water Co. *v.* Pennsylvania Pub. Utility Commission (1939) 28 F Supp 722, 30 PUR(NS) 305.

[4] (1939) 307 US 104, 28 PUR(NS) 65.

It seems evident that the basic idea of temporary rates will find ample support in the courts. In both the New York and Pennsylvania statutes there are certain shortcomings, however, which may be corrected by utility action now while this field of the law is in its formative stages. These shortcomings flow from the lack of limitation on the duration of temporary rates, the inadequate and demonstrably impractical character of the recoupment offered, and the conflict in methods of ascertaining how a fair temporary rate is to be established. In the Pennsylvania situation this conflict amounts to a confusion which only the Supreme Court may ultimately settle. The commission has employed three different methods of arriving at temporary rates. If any one of them is right, the other two are wrong.

Time limitations vary from the possible one year in Illinois to perpetuity in Pennsylvania and New York. In Illinois the temporary rate may be applied only if hearings to determine the fair permanent return will require more than 120 days. Then the rate, which is to be no more of a reduction than necessary to absorb the excess over the estimated fair return, can remain in effect for only one year.

There is no limitation under the Pennsylvania and New York laws. In addition to temporary rates the Pennsylvania commission also has the right to impose trial rates. The act says these may remain in existence for six months, or an additional trial period of six months. After that they may become permanent or, upon application of the utility, a hearing may be had to determine whether or not the rate should be increased or decreased in accordance with the valuations offered at such hearing. In several instances the commission has established trial rates for periods of six months and at the end of that period has ordered further trial rates resulting in further reductions in the charges of the utility. In another case the commission imposed temporary rates in July, 1937. A Federal statutory court enjoined the order. After the injunction issued, the commission imposed another temporary rate in November of 1937, which was likewise enjoined by the court. The issue was not decided until April, 1939, when the Supreme Court ruled that the temporary rates imposed were not confiscatory. Thus the effect of temporary rates in Pennsylvania has been to slow up rate regulation and valuation when there is litigation, whereas the most vaunted reason for the idea is that the procedure will expedite the matter, reduce litigation, and save money now being wasted on needless surveys.

Not only is there no limitation of time in the temporary rate pro-

¶ "Regulatory *commissions should be fair in their administration of temporary rates if they are to offer a solution for the problem of rate regulation. They should give careful consideration to established law in applying temporary rates, and temper their political views with a facing of facts in the record.*"

visions of the Pennsylvania statute; there is also no uniform minimum provision. Under § 312(a) the minimum is 5 per cent on depreciated original cost of physical property; under § 310(b), the return of the utility in 1935 or a subsequent year as the commission may determine; under § 310(d), rates which, in the opinion of the commission, will produce a fair return on a fair value. These sections may be applied as the commission sees fit.

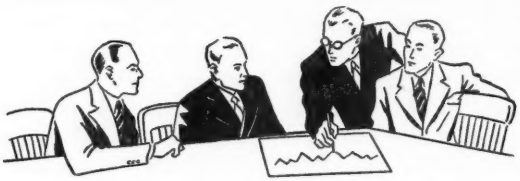
One subparagraph permits the commission to prescribe temporary rates every month "or at any other interval, if it be of the opinion that public interest so requires." This is obviously absurd. Temporary rates changed on less than several months' experience would be vicious and disruptive of the management of any utility. The provision is even more dangerous politically than it is economically. A politically minded commission could establish new rates faster than the courts could enjoin them.

In event the final rate established by the commission is in excess of the temporary rate which has been prescribed, amortization and recovery of the difference are mandatory under the Pennsylvania statute, permissive under that of New York.

In these and other states, however, too little thought has been given to the mechanics by which the utility is to recoup any taking of its property by reason of a noncompensatory temporary rate. Recoupment afforded the utility does not have the backing or pledge of public funds, though it is established law that if there is a taking of property without immediate compensation, the payment must be underwritten or guaranteed in some way by the legislature or a designated political division. The utility has no source other than its customers, as a group and not individually, to which it can look for ultimate repayment, and even that is uncertain. The legislature can abolish the law it enacted, leaving the utility powerless to collect its losses.

Another consideration is that the operating company doing business under a temporary rate may be sold or transferred by its parent company to another system. In that event it is unlikely that the commission would permit the buyer of the property—who has lost nothing by the temporary rate and who may have obtained a lower price because of it—to recoup any losses up to the day of transfer. Assuming that there is no sale of the property, it must be remembered that all utilities operate in highly competitive fields. This competition is between the utility and its customers. Large users of power such as manufacturers often establish their own power plants when the utility rate is higher than their own costs for such plants. The margin of selling advantage is usually very small. A recoupment rate may call for an advance in price sufficient to wipe out this margin. The natural result would be a curtailment of the use being made of the service of the utility.

The third criticism of temporary rates, particularly those applied in Pennsylvania, is not only that the basis on which they are established lacks uniformity, but that they may be confiscatory even with recoupment. Apparently the Pennsylvania commission has not adopted a settled policy as to the



Two Reasons for Temporary Rates

"ONE or both of two reasons are put forth by proponents of temporary rates in advocating the enactment of legislation. The first is the argument that existing rates are too high. . . . The second reason is the contention that, though there may be no objection to existing rates, lower ones would bring about increased consumption without reduction in total revenues."

procedure it will use in determining temporary rates, nor has it earmarked any of the methods for use in a particular set of circumstances. It is still possible, in other words, for one utility to have temporary rates producing a much different return than a similarly circumstanced utility. The United States Supreme Court has ruled that the Pennsylvania commission has interpreted its art as requiring it to take into consideration all of the relevant factors, announced in Smyth *v.* Ames, and not only original cost.[5]

The commission sought reargument to urge the prudent investment theory, which it makes synonymous with undepreciated original cost, on the plea that the court had mistaken its interpretation. The court denied the application. This leaves the commission in a position that is confusing to itself and filled with uncertainty for the operating utility companies.

[5] Driscoll *v.* Edison Light & P. Co. (1939) 307 US 104, 28 PUR(NS) 65.

It should be noted that the 5 per cent return allowed by the Pennsylvania statute may be on physical property only. Exclusion of indirect costs in reaching a rate base is something new in valuation proceedings. Moreover, the cost of a utility's property at the time it was first devoted to public use disregards any increase in cost resulting from transfers and sales. Cost to the first owner is small evidence of cost to the present owner. Transfers, mergers, rising prices, increases in land or plant values may make the original cost unrelated to the ultimate or last price paid for the utility. These matters can only be determined by the courts when the issues are presented squarely to them.

The idea of temporary rates is a good one, however, and it seems to offer much more of a solution than the prudent investment theory to the situation that now develops when a regulatory commission attempts to value the utility's property and fix its rates.

One of the chief objections to the present method of valuation and rate making is the long-drawn-out nature of the proceedings. Often the result is that estimates and figures on which the case is decided are out of date before the matter gets into an appellate court. Utilities are compelled to spend large sums for elaborate estimates of the original and reproduction costs of their properties. Temporary rates will speed up the rate-making process if properly applied. They permit reductions where needed without the years of delay entailed in the present method.

UTILITY managements should regard this as an advantage to themselves as well as to the public. Their coöperation would make for better public relations. Where the experimental temporary rate is found to be compensatory, the utility will be saved a great deal of money in useless litigation, engineering and accounting studies. It may also be able to secure dismissal of further rate regulation by having the temporary rate made final in a less costly manner and probably at a higher rate of return than would be determined through litigation. The commissions do not enjoy having their rate orders reversed by the courts, and boosting a temporary rate would not prove popular with the public.

Regulatory commissions should be fair in their administration of temporary rates if they are to offer a solution for the problem of rate regulation. They should give careful consideration to established law in applying temporary rates, and temper their political views with a facing of facts in the record. Their job is not an easy one, owing to the constant conflict of interest and objectives with the utilities, yet coöperation and fairness will produce results, speed up regulation, and assure court approval.

The following features are suggested for temporary rate statutes as fair to both utility and consumer:

(1) Restrict the use of temporary rates to situations in which permanent rates or rate proceedings cannot be established and concluded in four months or some other reasonable period.

(2) Limit the time during which a temporary rate may be kept in effect.

(3) Require the commission to proceed with rate hearings to establish permanent rates even though the validity of the temporary rate is litigated.

(4) Limit the amount by which the temporary rate may reduce the existing rate.

(5) Provide a more definite and more assured method and measure of recoupment which will:

(a) establish a rate at which, and a time within which, deficiencies resulting from temporary rates will be recouped;

(b) provide for interest on the deficiency under temporary rates and on the amount remaining due thereunder during the amortization period;

(c) provide that recoupment shall be assured to utilities affected by temporary rates even though the statute is modified or repealed, or the company sold.

IT is suggested that advocates of the prudent investment theory consider temporary rates as an alternative, and that utility managements and persons in control of utility policy look upon temporary rates in the same manner. Though possessed of numerous defects, none of them seems inherent in the idea, but rather the product of faulty draftsmanship of the statutes. They offer at least a new approach to and a partial solution of a difficult problem. It cannot be denied that, if properly administered, they would

speed up the process of rate making and eliminate much useless effort and expenditure on the part of both the regulatory commissions and the utilities.

Fun with the Phone Book

ONE of the oddest twists that ever developed in the Manhattan telephone book (and there have been quite a few of them) was the appearance on page 927 of the 1938-1939 edition of ten "Minnie Smiths," all located at "601 West 101st," but each with a different phone number. Curiosity seekers passed the word around and some practical jokers began calling up to ask questions about the ubiquitous Minnie Smith. The explanation, appearing in *The New York Times* of June 13, 1939, was innocent enough. The original Minnie Smith had rented several apartments in the building at the address given and had sublet to roomers, having ten pay station phones installed for their convenience. Without even thinking about the duplication, Mrs. Smith had authorized all the directory listings in her own name. But when Walter Winchell picked it up last winter and a popular weekly magazine carried a piece about it, the embarrassment and annoyance of Mrs. Smith and her tenants increased to the breaking point. However, when the summer edition for 1939 was published, a lone "Minnie Smith" appeared. One tenant said the other numbers had been transferred to the unlisted file—or, at any rate, he certainly hoped so.

Last year in London the Inns of Court and the British bar rocked with indignation because 600 barristers found themselves sandwiched between Bankers and Barrowmakers in the "classified trades" section of the London telephone book. An enraged General Council of the British Bar asked a resolution demanding that the Postmaster General of Great Britain (who runs the telephone service over there) remove the dignified K. C.'s from their position as trade neighbors to barrowmakers and bankers. However, the Postmaster General indicated that he wasn't thinking of etiquette when he put the barristers in the London telephone trade section. He was thinking of public convenience and pointed out that physicians and surgeons do not complain about that profession being listed between Physical Culture and Pianos. Incidentally, in the classified section of the Washington telephone directory the learned profession of the law appears between Laundries and Lead Pencils—a situation which prompted one waggish attorney to remark that unless some lawyers in the national capital can "clean up" pretty soon in a business way, they might be out on the street selling lead pencils.

A hot weather pastime for lazy people is looking for the name of one's favorite movie star in the local telephone book. The directory of almost any fair-sized city is likely to turn up a "Robert Taylor" or a "William Powell." But it is surprising how other telephone namesakes bob up in the most surprising places. Here are just a few of the more popular movie stars whose names appear in the Manhattan telephone directory: Fred Allen, Gracie Allen, Charles Boyer, Bob Burns, Harry (Bing) Crosby, Bette Davis, Irene Dunne, Jimmy Durante, Charles Farrell, Herbert Marshall, the Marx brothers (all four of them), Jeannette MacDonald, Grace Moore, Jean Parker, Mary Pickford, Gloria Swanson, and Rudy Vallee. Commercial sidelines of the little star Shirley Temple have spread her name all over the country and even such cartoon personalities as Mickey Mouse and Popeye make frequent appearance in the phone book.

Wire and Wireless Communication

Almost important triumph from the FCC point of view was the Supreme Court's decision on January 29th in a pair of test cases, known as the Pottsville Case and the Heitmeyer Case, respectively, which grew out of the commission's jurisdictional feud with the District of Columbia Court of Appeals with respect to appellate procedure in radio broadcast license controversies. The unanimous opinion, written by Mr. Justice Frankfurter (Justice McReynolds concurring in the result) generally sustained the position taken by the FCC.

In the first case the Pottsville Broadcasting Company applied, May, 1936, to the FCC for a permit to build and operate a broadcasting station at Pottsville, Pa. The commission denied this application on two grounds: (1) That the applicant was financially disqualified; (2) that the applicant did not have sufficient local interest in the community which it proposed to serve. The applicant appealed to the District of Columbia Court of Appeals with the result that the commission was reversed and the case was remanded with a direction that the broadcasting license be issued. The lower court held in that case that the commission's conclusion regarding the applicant's lack of financial qualification was based on erroneous construction of Pennsylvania law, and that the second ground for disqualification had no bearing on the commission's conclusion.

Following the remand, however, the FCC reopened the entire case, which included two rival applications for the same facilities which had been filed subsequent to the Pottsville application. Again the Pottsville Company appealed and obtained from the court of appeals a writ of mandamus forbidding the commission to broaden the scope of the proceedings.

From this decision the commission appealed to the highest court. The U. S. Supreme Court held, first of all, that the court of appeals did not have the power to issue a writ of mandamus directing the FCC to restrict itself to the original record in reconsidering the application.

Justice Frankfurter's opinion observed that an appellate court may not interfere with a regulatory commission's administrative discretion which is exercised after a remand. The Frankfurter opinion stated:

> The fact that in its first disposition the commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress can confer such a priority. It has not done so. The court of appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

THE Frankfurter opinion also made an interesting distinction in disallowing the lower court's attempt to invoke the familiar doctrine that a subordinate tribunal is bound to respect the mandate of a superior tribunal and cannot reconsider questions which the mandate has laid at rest. "This," stated the Frankfurter opinion, "was not a mandate from court to court but from a court to an administrative agency."

The opinion went on to point out that administrative tribunals grew out of a need for governmental supervision over an economic enterprise which could not be exercised effectively either through self-executing legislation or through the judicial process. Consequently, such special tribunals by their very nature are invested with "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims." Differences in origin and function "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

The Supreme Court rejected the argument that if all matters of administrative discretion remain open for determination on remand, a succession of single determinations upon single legal issues would be possible with resulting delay and hardship to appellants. The highest court observed that "courts are not charged with general guardianship against all potential mischief in the complicated tasks of government . . . Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal."

The Supreme Court's decision in the Heitmeyer Case was controlled by its decision on the same day in the Pottsville Case. The only "relevant" difference being that in the Heitmeyer Case the FCC proposed not only to reconsider the remanded application along with rival applications, but also to reopen the record and take new evidence on the comparative ability of several applicants to satisfy "public convenience, interest, or necessity." The highest court's opinion, again written by Mr. Justice Frankfurter, stated on this point:

> The commission's duty was to apply the statutory standard in deciding which of the applicants was to receive a permit after it fell into legal error as well as before. If, in the commission's judgment, new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the Pottsville Case, *ante*, bar it from access to the necessary evidence for correct judgment.

* * * *

THE Pennsylvania Public Utility Commission, as had been generally expected, emerged the victor in its Supreme Court contest with the Bell Telephone Company over the $600,000 a year intrastate toll rate revision ordered by the commission in May, 1937. The Bell Telephone Company had appealed this to the superior court of Pennsylvania which affirmed the commission's order, and the supreme court of Pennsylvania, in turn, refused to hear a further appeal. This brought the case to Washington under an appeal directly from the judgment of the superior court.

In arguing the case, counsel for the Bell Telephone Company of Pennsylvania contended that the commission's order was based simply on a section of the state regulatory law (§ 304) forbidding discrimination and was entered without any support as to the reasonableness of the new rates ordered into effect. This, the company contended, constituted a denial of due process guaranteed by the Constitution.

After the company's counsel had been questioned considerably from the bench, it seemed that the highest court justices were not satisfied that the company had made a sufficient showing that any substantial Federal question was involved. This was apparently because of the company's failure even to allege that the rate reduction ordered by the state commission would result in confiscation. At any rate, Chief Justice Hughes interrupted the argument by informing counsel for the Pennsylvania commission that it would be unnecessary for them to present their side of the argument which made a dismissal of the tele-

phone company's appeal a foregone conclusion.

ON January 29th, in a brief *per curiam* decision, the court stated in part:

> . . . . it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a Federal question. Arrowsmith *v.* Harmoning, 118 US 194, 196; Bonner *v.* Gorman, 213 US 86, 91; American Railway Express Co. *v.* Kentucky, 273 US 260, 273.
>
> As to the second contention, where there is no claim of confiscation, the state authority is competent to establish intrastate rates and in so doing to decide what constitutes an unreasonable discrimination with respect to intrastate traffic. See Stone *v.* Farmers Loan & Trust Co., 116 US 307, 325; Portland Railway, Light & Power Co. *v.* Railroad Commission, 229 US 397, 410; Los Angeles Gas Co. *v.* Railroad Commission, 289 US 287, 304, 305; West Ohio Gas Co. *v.* Public Utilities Commission, 294 US 63, 70.
>
> Finally, it appears that the commission's order related exclusively to intrastate traffic and that there was no attempt to regulate interstate rates.
>
> The appeal is dismissed for want of a substantial Federal question.

ANOTHER telephone rate case appeal before the Supreme Court assumed additional importance with the filing of *amicus curiae* briefs by the FCC, as well as the National Association of Railroad and Utilities Commissioners. This was the appeal by the Wisconsin Public Service Commission from an adverse decision of its own highest state court, which invalidated the commission's 1936 rate reduction order against the Wisconsin Telephone Company.

The telephone company resisted the commission's petition for *certiorari* in a brief filed January 20th, which was also to the effect that the appeal did not involve any substantial Federal question. The telephone company's brief pointed out that the Wisconsin Supreme Court had not found that the commission's telephone rate order was "confiscatory" but only that the rate reduction should be set aside because of failure to proceed in accordance with the state court's conception of state law governing commission procedure.

However, the FCC's brief, in which the FPC, ICC, and several other departments joined, attempted to use the case as a vehicle for having the Supreme Court overrule its doctrine concerning the estimation of depreciation in rate-valuation cases laid down in McCardle *v.* Indianapolis Water Co., 272 US 400, PUR 1927A, 15. In that case it was held that depreciation ought to be estimated on the basis of actual observation of physical wear, tear, and obsolescence. The government agencies, however, asked the court to approve the Wisconsin commission's view that depreciation ought to be estimated on the basis of depreciation experience as reflected in the depreciation reserve and on life tables theoretically determining the useful expectancy of depreciable property units.

The Supreme Court, also on January 29th, granted a *certiorari* to review an appeal by the Western Union Telegraph Company from a damage award growing out of the company's money order tariff. The lower court had held that a provision in the telegraph company's money order tariff that the company should not be liable "beyond the sum of $500, at which amount the right to have this money order promptly and correctly transmitted and properly and fully paid as hereby valued" created a liability for liquidated damages.

* * * *

THE Federal Communications Commission on January 25th voted to institute studies as to the possibility of further reductions in the long-line rates of the American Telephone and Telegraph Company. Commissioner Paul A. Walker had reported that figures before the commission indicated a substantial saving to telephone subscribers might be

made without reducing net earnings of the company below a fair return on the reasonable value of the property used in the interstate service.

The commission will proceed under the order of September 9, 1936, authorizing an investigation which subsequently was stayed by negotiations with the company resulting in reductions.

Immediate action looking to an additional reduction in telephone rates to the extent of at least $10,000,000 had been recommended to the Federal Communications Commission by Commissioner Paul A. Walker. Commissioner Walker reported that it was apparent "that the net earnings of the Long Lines Department of the American Telephone and Telegraph Company are in excess of a fair return on a reasonable value of the property devoted to interstate communication service."

Commissioner Walker suggested that the commission take action under its order of September 9, 1936, calling for an investigation into the rates, charges, classifications, services, and practices of the company, but held in abeyance by long-distance rate reductions made effective January 15, 1937, during the progress of the telephone investigation.

As a result of negotiations subsequent to entering the order for inquiry, interstate telephone message rates were reduced to a basis which was estimated to produce a reduction in annual revenues of the company, based on the 1936 volume of its business, of about $12,000,000. As the matter turned out, the subscribers benefited to the extent of $12,235,000 for the year 1937 but the revenue of the company was not proportionately affected.

The increased volume of business resulting from the rate decrease and other causes, having now continued for three years, according to Commissioner Walker, justified another proportionate and substantial reduction in long-line tolls.

WASHINGTON opinion was somewhat cautious about the outcome of the FCC's latest move to cut the interstate long-distance rates of the AT&T inasmuch as the commission has neither the time nor the funds to launch an elaborate formal rate investigation on the scale that would be necessary. There was some suggestion that the FCC might really be maneuvering for a negotiation whereby the AT&T would voluntarily cut rates as it did under similar circumstances in the fall of 1936. In any event, the pendency of the rate investigation would have a tendency to aid the FCC's repeated request that Congress make a special appropriation to regulate the telephone industry.

The transcript of hearings before a subcommittee of the House Appropriations Committee recently revealed the fact that the FCC has not given up hope of obtaining such additional funds, although it was defeated in Congress last year and cut out of its regular budget early last month. The amount sought both times was $300,000. It was thought that the FCC might later revive the request in the form of a plea for a supplemental appropriation. The independent offices bill, recently passed by the House, contains no special amount for telephone regulation. Last year, the appropriation committee refused to allow any sum for carrying out the FCC program for regulation of the Bell system.

Chairman Fly, in testimony before the House committee, said that inability to regulate the telephone industry was one of the "voids" in the FCC's work. Mr. Fly, who assumed chairmanship of the FCC last September 1st, said he was greatly impressed with the inability of the FCC, because of insufficient funds, to carry out the tremendous amount of work delegated to it by Congress. He said it was "false economy" not to spend some money to regulate the Bell system. Mr. Fly told the committee:

> We have not only the power, but we have the duty; and I am reluctant to take any part of the responsibility for not performing that duty. You have there a most complicated set-up—the greatest of all monopolies anywhere. It is a vast, complicated structure. Now, without criticizing it on that account, without condemning it, I do want to suggest that it must be regulated. Any such monopoly must be regulated, and

a vast, complicated system of that kind ought to be regulated.

Mr. Fly added that he hoped something would be done about this later "by way of a special appropriation." The FCC plans no further investigation of the Bell system, he told the committee.

* * * *

THE telephone industry was somewhat disturbed by the outbreak of so-called "telephone picketing" in labor disputes during recent weeks. In Kansas City last month the "telephone blockade" was introduced as a picketing maneuver. First victim of the "freeze-out" was the Linwood-Indiana laundry. For nine days its four telephones rang incessantly, calls totaling 12 to 16 a minute, until regular customers were unable to place orders.

John G. Hankel and Clyde M. Parker, partners in the business, went to court and obtained a restraining order. After restraining orders were served on two labor organizations and fourteen labor officials, telephones ceased ringing. Regular customers again could place orders.

In Wichita, Kan., the Luling Laundry, dubious of a court injunction's effect against the telephone blockade by striking workers, advised patrons through an advertisement to telegraph their complaint about unsatisfactory service. The laundry promised to refund telegraph charges.

Subsequently, seven Wichita laundries pressed a court fight against the "telephone blockade" by applying for a district court injunction which would prevent an additional sixteen members of the Wichita Laundry Workers Union from making fake calls to the laundry.

By mere coincidence the abuse of telephone service was subjected to judicial discipline of a criminal law variety in a somewhat different case recently tried by a district court of Sedgwick county in which Wichita is located. The county jury held that repeated efforts to collect a loan by telephone constitutes a disturbance of the peace if the debtor loses his job because of the creditor's persistence.

The decision was on an appeal by the manager of a Wichita loan company, who was convicted in police court and sentenced to sixty days in jail and fined $3.50 for disturbing the peace of a grocery clerk. The clerk testified he had lost two jobs and was threatened with the loss of a third because of repeated telephone calls by the manager requesting payment.

In New York on January 24th a union of office workers also decided to use the telephone to picket the boss. After police limited the number of pickets on the street to six, a local of the United Office and Professional Workers (CIO), on strike against the Credit Clearing House, mailed out several thousand posters. "Keep calling them and protesting," said the poster.

* * * *

THE Bell Telephone system won a rather important victory with respect to operating policy when the Pennsylvania commission, early last month, refused to direct the Bell Telephone Company of that state to establish trunk connections with a privately owned dial intercommunicating system located in the offices of a Philadelphia firm.

In its ruling the commission declared "divided ownership is incompatible with efficient telephone regulation." The commission pointed out that it has supervisory powers over public telephone facilities but would be unable to regulate privately operated systems. The commission's order stated that before approaching the problems presented by the case it should be noted:

> The purposes of McCloskey & Company, as disclosed by the record, are to secure an improvement in its telephone service and a reduction in the cost thereof by an arrangement of its privately owned system for access, through trunk connections, to the general exchange systems of the Keystone Telephone Company and respondent. Neither the general adequacy of respondent's (Pennsylvania Bell) service nor the reasonableness of its rates is here challenged.

The Bell Company contended that in refusing to give the desired connection to its system, it had pursued a course of conduct which it had followed consistently for a number of years.

Financial News and Comment

By OWEN ELY

How Big a Depression Is on the Way?

THE chart on page 227 illustrates the vital rôle played by the so-called heavy industries in the American business cycle during the past twenty years. The production of durables (producers' goods) as compared with nondurables (consumers' goods) has largely determined the trend of general business activity. The accompanying chart shows the Federal Reserve index for the past twenty years, with the nondurable and durable components (top and bottom lines of black area). Figures 1-6, at points where durable goods have overtaken nondurable (narrow points in the black area), indicate danger signals:

"Danger Signals" No. on Chart	*Date*	*Per Cent Subsequent Decline in FR Index*
1	Jan. 1919	7%
2	June 1920	30
3	June 1923	21
4	June 1929	54*
5	Aug. 1937	33
6	Dec. 1939	..

*The decline during 1929 amounted to 18 per cent.

The sixth danger signal was recently given. A clue to the severity of the readjustment may lie in the action of nondurable goods. Where this is favorable, as in 1919, the business decline is less severe; where nondurable goods have already been on the down-grade (1920, 1923, and 1937), or where gains were small, as in 1929, a sharp reaction is more likely. Since this indication is favorable in the present case (nondurable goods have been advancing), a relatively mild readjustment seems indicated for 1940.

Chairman Frank "Reassures" Utility Investors

PRESS reports recently indicated that the SEC is preparing to issue a "show cause" order for system integration under § 11 of the Holding Company Act against Middle West Corporation, and that orders would follow later against eight other large systems—Electric Bond and Share Company, North American Company, Commonwealth & Southern Corporation, Standard Power & Light Corporation, United Gas Improvement Company, United Light & Power Company, Cities Service Company, and Engineers Public Service Company.

Possibly owing to recent recurring market weakness in certain holding company utilities, Chairman Frank subsequently sought to reassure utility investors. In an address before the American Management Association, he denied any intention to "crack down" on holding companies, or to apply a death sentence to the industry. He declared that the SEC merely intended to carry out the "carefully planned congressional purpose of rejuvenating local utility management."

Mr. Frank said:

> . . . there will be a lot of comment that we are setting out to destroy the investments of innocent investors. But we are not magicians. We cannot destroy a second time what financial trickery or folly of the past has once destroyed. Neither we nor the present holding company managements can bring back to life value that was stillborn or stifled in the financial whirlpool of the mad twenties.

However, Mr. Frank was reported to have stated after the meeting that "noth-

ing in the address was intended to indicate that money invested in some of the holding companies was not backed by real values which will not be found to exist," adding, "we will do everything to preserve these interests." He said he was certain there would be no destruction of security values.

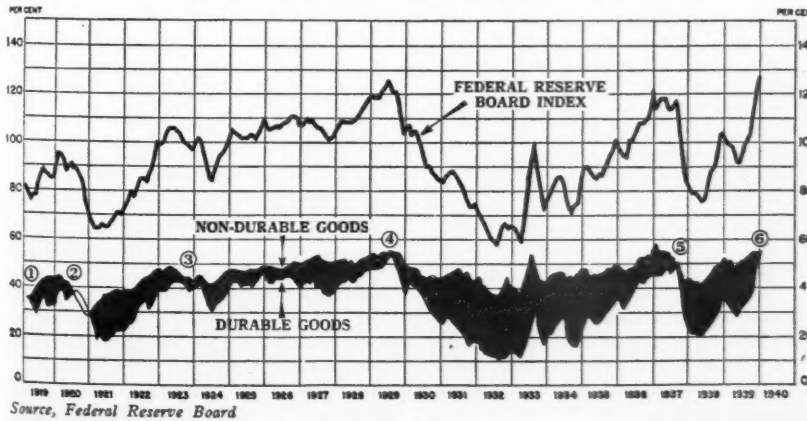
Chairman Frank pointed out that the SEC had no intention of singling out any particular company, and that any priority of action should not give the impression of discrimination. Under the law any company will have a year's time to comply with SEC orders, which will be issued only after submission of briefs and hearings. Companies can ask for a further extension of time and will also retain the right of appeal to the courts. While Mr. Frank denied the SEC would interfere with management, he said:

> Where the holding company management attempts to mucker up the financial structure of the local operating companies, where it wants them to issue unsound securities, where it wants its operating subsidiaries to pay upstream dividends that have not been earned, where it wants to drain off earnings of the local companies through improper service contracts and other unbusiness-like devices — there Congress unquestionably told us to restrain the hand of holding company management. And we shall continue to do what Congress has told us to do.

RECENT SEC activities have conformed to the pattern of Mr. Frank's remarks. The commission has repeatedly questioned the right of Morgan Stanley & Co., Inc., to act as bankers for large utility systems and has stressed the "local banker" rôle as against New York city control. Investment bankers have been questioned regarding the viewpoint that investment banking is a profession as well as a business, and that continuing relations with one banker or banking group are advantageous as compared with competitive bidding. Elaborate charts have been published showing the location of holding company headquarters (usually in New York or Chicago), and the maximum and average mileage of headquarters from the operating companies. Holding company management of operating company finance, as in the Consumers Power Case, has been sharply criticized.

The SEC recently prohibited all purchases and sales of securities between affiliated utility companies, unless approved by the commission. Moreover, regardless of from whom the securities are acquired, a registered holding company must have SEC approval if in one year it repurchases over one per cent of its own outstanding debt or acquires over one per cent of any outstanding class of a

RELATION OF DURABLE TO NONDURABLE GOODS PRODUCTION COMPARED WITH FEDERAL RESERVE BOARD INDEX



Source, Federal Reserve Board

subsidiary's securities. (Previously the exemption had extended to 2½ per cent of the purchasing company's consolidated assets.)

Obviously the commission now proposes to check in minute detail all the financial relations between the holding companies and their subsidiaries. The Consumers Power decision indicates that the holding companies can no longer freely invest their own funds in subsidiaries; and the commission is closely scrutinizing payments by the operating companies to their holding companies to make sure that they are not "upstream loans" under the guise of interest or dividends. If these various restrictions continue to be enforced, legitimate financial management, as exercised by most holding companies, will in future be seriously hampered by SEC rules.

Chairman Frank complained in his recent address that only one or two systems had voluntarily begun programs of integration. Such a statement, if correctly quoted, would seem seriously to underestimate the progress made by many holding companies in eliminating corporate deadwood, reducing the number of subholding companies, etc. It is true that progress has been slow and that little has been accomplished in the way of geographic integration. But the SEC itself should share the blame with the utilities, because it has never published a rational, broad interpretation of § 11; it has issued little public comment on the preliminary integration plans from all systems which it obtained over a year ago; and it has only recently begun public hearings on the so-called test case of American Gas and Electric.

However, while the recent attitude of the SEC is doubtless discouraging both to the utilities and their bankers, because of the increased delays and difficulties in handling routine financial operations and in planning 1940 expansion programs, some comfort is afforded by latest reports (not yet available in detail) that the SEC is coöperating with the Standard Gas management by approving the proposed changes in the Philadelphia Company balance sheet.

Standard Gas Securities Gyrate

RECENT weakness in the securities of Standard Gas and Electric were due to plans of Philadelphia Company, an important subsidiary, to set up a $23,000,000 balance sheet reserve for possible loss on traction properties.

On January 30th, the Securities and Exchange Commission approved a declaration filed by Philadelphia Company, involving a number of transactions, and certain changes in the voting rights of the declarant's preferred stock. The company is a subsidiary of Standard Gas and Electric Company.

The commission's order permits Philadelphia Company to do the following:

(1) Reduce the stated value of its 4,800,814 shares of common stock from $10 a share to $7.25.

(2) Create a reserve for revaluation of assets by the transfer to reserve of (a) the surplus balance of Philadelphia Company as of December 31, 1939; (b) the paid-in surplus created by the reduction of the stated value, so that the reserve would total $23,000,000.

(3) Make certain changes in the voting rights of the preferred stocks.

The transactions included in the declaration must be submitted to the approval of stockholders of Philadelphia Company and the findings of the SEC must be transmitted to the stockholders.

After permitting the declaration to become effective with regard to the change in the voting power of the preferred, the SEC stated:

> We reserve complete freedom of action in considering the question of equitable distribution of voting power in connection with § 11 (b) (2), or with any other proceedings in which that matter may be germane.

Incidentally, Philadelphia Company's bond indenture provisions prevent payment of dividends if stated capital and surplus fall below $74,000,000. According to the balance sheet dated December 31, 1938, the preferred stocks had a stated value of approximately $39,959,650, common stock $48,005,629, and surplus $14,793,140, making a total of $102,758,419. On this basis the company

could take a write-off of several millions in excess of $23,000,000 and still pay dividends. But the investment in street railway companies was carried at over $50,000,000 (which included $11,801,000 matured bonds).

STANDARD Gas (parent company) in 1938 received from subsidiaries about $5,190,000 in dividends and $182,000 in interest, against which it paid out $324,000 in expenses and taxes and $4,708,000 interest (round figures). It owns 4,634,530 shares of Philadelphia Company, which in 1938 and 1939 paid 55 cents per annum. A 25-cent dividend was also declared on December 15th, payable January 25th, this year. It is obvious that if the income from Philadelphia Company dividends is cut off completely, this would eliminate income of about $2,550,000 a year and would eventually interfere with interest payments on Standard Gas bonds. However, some of the other Standard Gas properties are showing improvement; Mountain States Power is effecting a reorganization and Wisconsin Public Service has cleared up preferred dividend arrears.

Standard Gas and Electric early this year had approximately $4,500,000 cash on hand, augmented to about $5,600,000 January 25th with receipt of the Philadelphia Company dividend. Obviously, this would provide for interest payments for a year ahead; but whether this would give enough time to clear up the Philadelphia Company's refunding operations, etc., is questionable.

Based on stated property values of the subsidiaries of Standard Gas system, bonds of the system seem fairly well covered by assets. This should be a supporting factor even should the Standard Gas system be compelled to reorganize over the near future. So far as current system earnings per share (about $7 a share) are concerned, the $7 and $6 first preferred appear to have a good equity position. The SEC stated the Philadelphia Company for many years has used its income to pay dividends on preferred and common stock, indicating pressure to declare common dividends.

SEC Held Inconsistent on Competitive Bidding

PRESIDENT Allan M. Pope of the First Boston Corporation, in a recent address before the American Management Association, held that the SEC's present attitude favoring competitive bidding for corporate security issues is inconsistent with its past position. Some five years ago, Colonel Pope stated, the SEC called a few investment bankers to Washington and said that the public must be given a break—that new bond issues should be conservatively priced at retail so that they would be likely to advance a point or two in the open market after the flotation of the issue. Naturally, this agreed with the views of the bankers, for leading houses have long followed just this practice. Today, Colonel Pope stated, the commission has virtually reversed its attitude and expects underwriters "to sharpen their pencils to the breaking point" to obtain top prices for the utility companies from the public.

He pointed out that the idea of competitive bidding may appeal to the lay mind because it is successfully used to protect public interests in government building contracts, departmental purchase of supplies, etc. But the object in these cases is to buy the goods cheaply for public consumption, not for immediate resale to the public.

Colonel Pope also pointed out that the possibilities of error may be greatly increased if competitive bidding becomes a practice. Investment bankers will be unable to give the same careful attention to legal details if they must enter bids on a variety of issues instead of acting as advisers in their capacity as syndicate heads. Few investment houses could afford to pay legal expenses for an issue before the award, and there would be insufficient time between the award and the sale. Moreover, legal opinion would have to be secured on a number of issues where the bid proved unsuccessful. He stated that in three issues of bonds prepared and approved by very large corporations through competitive bids, not one of the companies, in the opinion of

independent lawyers, had the actual power to pledge the security they agreed to pledge, the errors being innocently made by the corporations' staffs. The legal services of the banking house would have helped detect the errors.

He pointed out that the chance of error in legality is slight and simple to determine in the case of municipal issues, but that corporate financing is more apt to lead to vital errors where competitive bidding is used.

Holding Company Securities Hit By SEC Announcements

WHILE stocks of operating utility companies have shown comparatively little change recently, news developments from Washington or elsewhere have resulted in marked weakness in certain holding company bonds and preferred stocks. First, Associated Gas issues had a sharp sinking spell, following SEC announcements and the resulting bankruptcy proceedings. Then Standard Gas issues were hard hit by fears that Philadelphia Company dividends might be shut off due to a pending SEC decision on traction write-offs (see page 228). Next, Portland General Electric bonds were hurt by a trustees' disagreement, while pressure continued against other Northwest securities owing to an approaching show-down on Bonneville power. Finally, reports that long-drawn-out integration plans would be hastened by "show cause" orders, together with Mr. Frank's talk, apparently caused declines in some holding company preferreds, as American Power & Light and Electric Power & Light.

It was probably unfortunate coincidence that these various developments, together with the Consumers Power and Dayton Power difficulties, should so nearly synchronize. The combined results may have a retarding effect on utility financing plans and building programs for 1940. While refunding of high-grade bonds still remains theoretically easy, as long as money rates hold up, bankers prefer smooth sailing for even the best issues; and to plan for the raising of new capital is particularly difficult under conditions now prevailing.

New York City May Condemn B.-M. T. to Effect Unification

MAYOR LaGuardia of New York is making a determined effort to complete his unification program. It is difficult to see how any real hitch can occur in the Interborough-Manhattan plan, but litigation over a minor bond issue and delays in obtaining 90 per cent deposits have threatened to delay acquisition of B.-M. T. The mayor has, however, the choice of several weapons in his legal arsenal to deal with recalcitrant bondholders. He can "recapture" parts of the property under the original agreement between the company and the city, although this procedure might be an expensive device. He has obtained a $2,000,000 RFC loan (possibly augmented by city funds) with which to buy up undeposited securities. Moreover, he can resort to condemnation proceedings against the properties securing the mortgages of the Kings County Elevated or the Brooklyn Union Elevated.

On February 1st Mayor LaGuardia and Comptroller McGoldrick declared their intention to bring the B.-M.T. plan to the "operative" stage by February 14th, or to serve notice on or before that date of termination of contract, either as a whole or as to the street car and bus lines. They also announced a move to have the city acquire undeposited securities by inviting holders to submit tenders.

The city is prepared, it was indicated, to pay about $11,000,000 to acquire the $13,000,000—par value—of B.-M.T. securities required to make operative that part of the unification plan that covers the rapid transit lines and power plants. No tenders will be accepted, it was said, unless total tenders are sufficient to make the plan operative and the prices asked are "satisfactory." It was indicated that a "satisfactory" price would be one substantially lower than fixed in the plan.

EARNINGS STATEMENTS OF LEADING UTILITY SYSTEMS

	No. of Months Included	End of Period	System Earnings per Share (a) Last Period	Previous Period	Per Cent Increase	Per Cent Decrease
Electric and Gas						
American Gas & Electric	12	Nov. 30(b)	$2.52	$2.19	15%	..
American Power & Lt. (Pfd.)	12	Nov. 30(b)	5.77	5.51	4	..
American Water Works	12	Sept. 30(c)	.62	.36	72	..
Boston Edison	12	Sept. 30	9.92	8.30	20	..
Columbia Gas & Electric	12	Sept. 30(c)	.52	.36	45	..
Commonwealth Edison	12	Nov. 30	2.45	..	..	..
Commonwealth & Southern (Pfd.)	12	Nov. 30(b)	8.82	6.73	31	..
Consolidated Edison, N. Y.	12	Sept. 30(c)	2.18(g)	2.23	..	2%
Cons. Gas of Baltimore	12	Nov. 30	4.87	3.96	23	..
Detroit Edison	12	Dec. 31	7.58	6.16	23	..
Elec. Power & Lt. (1st Pfd.)	12	Nov. 30(b)	5.63	5.74	..	2
Engineers Public Service	12	Nov. 30(b)	1.57(h)	.78	..	..
Inter. Hydro-Elec. (Pfd.)	12	Sept. 30(c)	10.96	3.61	203	..
Long Island Lighting (Pfd.)	12	Sept. 30(c)	5.07	4.70	7	..
Middle West Corp.	9	Sept. 30(c)	.24	.22	9	..
National Power & Light	12	Oct. 31(bc)	1.07	1.27	..	16
Niagara Hudson Power	12	Sept. 30(c)	.52	.49	6	..
North American Co.	12	Sept. 30	1.81	1.59	14	..
Pacific Gas & Electric	12	Sept. 30	2.84	2.42	17	..
Public Service Corp. of N. J.	12	Dec. 31(b)	2.88	2.34	23	..
Southern California Edison	12	Sept. 30(c)	2.46	1.92	28	..
Standard Gas & Elec. (Pr. Pfd.)	12	Sept. 30(c)	7.40	3.12	137	..
United Gas Improvement	12	Sept. 30(c)	1.07	.97	10	..
United Light & Power (Pfd.)	12	Nov. 30	5.70	6.58	..	14
Gas Companies						
American Light & Traction	12	Nov. 30	1.49	1.45	3	..
Brooklyn Union Gas	12	Sept. 30(c)	3.36	2.14	57	..
Lone Star Gas	12	Sept. 30(c)	1.05	.84	25	..
Pacific Lighting	12	Dec. 31	3.60	4.18	..	14
Peoples Gas Light & Coke	12	Sept. 30(c)	2.88(f)	2.52	14	..
United Gas Corp. (1st Pfd.)	12	Nov. 30(b)	10.52	11.98	..	12
Telephone and Telegraph						
American Tel. & Tel. (i)	12	Nov. 30(c)	10.11	8.21	23	..
General Telephone	12	Sept. 30(c)	1.99	1.86(e)	7	..
Western Union Tel.	11	Nov. 30(b)	.79	D1.94	..	..
Traction Companies						
Greyhound Corp.	12	Sept. 30(c)	2.37	....	..	..
Twin City Rapid Tran. (Pfd.)	9	Sept. 30(c)	.87	D4.82	..	..
Systems outside United States						
Amer. & Foreign Pwr. (Pfd.)	9	Sept. 30	5.36	5.88	..	9
Inter. Tel. & Tel. (d)	9	Sept. 30	.62	.96	..	35

D—Deficit.

(a) On common stock, unless otherwise indicated following name of company.
(b) Data also available for month indicated.
(c) Data also available for quarter indicated.
(d) Excludes Spanish subsidiaries, and in 1939, German and Polish subsidiaries.
(e) Includes earnings of General Telephone Tri Corporation and subsidiaries from August 30, 1938 (date of acquisition).
(f) Earnings for calendar year 1939 estimated at $3.25, compared with $2.48 in 1938.
(g) Earnings for calendar year 1939 estimated at $2.25.
(h) Excludes loss of Puget Sound Power and Light Company.
(i) The parent company for the calendar year reported $9.23, compared with $8.16 in 1938.

What Others Think

Mr. Stanley Draws a Bead on Competitive Bidding

For more than a year there has been renewed public discussion about competitive bidding for a new issue of corporate securities — especially utility securities. Among the first publications to flush this revival of interest was Public Utilities Fortnightly, which began a series of articles on the subject over three years ago. Since then the National Association of Railroad and Utilities Commissioners appointed a special committee which made an interesting report neither condemning nor entirely endorsing competitive bidding, which is to be found in the proceedings of that association for the 51st annual convention at Seattle in August, 1939.

But the most impressive forum was that furnished by the Temporary National Emergency Committee, better known as the O'Mahoney committee, in its recent hearings on investment banking. Harold Stanley, president of Morgan Stanley & Co., well-known Wall Street underwriting house, was permitted by the committee to submit a memorandum on competitive bidding which summed up pretty fairly the case against that practice. Since argument along this line is not so common as argument in the other direction, Mr. Stanley's analysis deserves special notice.

Mr. Stanley took care to point out that his opposition to competitive bidding did not include opposition to competition among investment bankers generally. It is merely against the proposal that regulatory authorities should require that all new issues of corporate securities be put on the auction block for sale to the highest bidder. No one would think, he said, of making use of competitive bidding in hiring a lawyer or doctor. Yet, he believed that the relationship between a corporation and its investment banker might be equally dependent upon the establishment of personal confidence, which invariably marks the relationship between doctor and patient, or attorney and client.

Thus, when a corporation first enters the capital market it chooses its banker from a number anxious to be selected. If the first transaction proves satisfactory, it usually tends to be a continuing one, based on mutual trust like most satisfactory relationships in all walks of life.

Competition in the larger sense continues even here. The banker must be able, diligent, and careful, for if he bungles, the business will go elsewhere. It is noteworthy that compulsory competitive bidding has never been voluntarily adopted as a general practice by issuing corporations, nor requested by investors. Although they could have required competitive bidding any time they felt like it, generations of corporate enterprises have preferred continuing private relations with their tried and true bankers.

Who is it, then, that desires to impose the compulsory competitive bidding requirement? Mr. Stanley divides these proponents into several categories: Those who sincerely believe that competitive bidding is in the best interest of borrower and investor. Some rival bankers trying to serve their own business ends by playing on sectional feeling. Some who may wish to discipline corporate management as a matter of reform under the apparent impression that fair dealing cannot exist.

In the last named class the banker referred to one critic who insisted that competitive bidding, even if it had some disadvantages, should be used to free

companies from "banker domination."

The function of the underwriter, according to Mr. Stanley, is to advise corporations about their financial program, to supply expert counsel, and stake his own good name and money in underwriting and sponsoring securities brought out pursuant to the program advised. Lacking such assistance, the issuing corporation might set up its issues on a one-sided basis without considering the investor's point of view. The banker, on the other hand, informs the corporation desiring to raise new capital whether it should raise mortgage bonds, convertible debentures, collateral trust notes, or preferred or common stock.

THE banker's reputation depends on his ability to see that the article he offers for sale is sound and that it is adaptable to the needs of the clientele to be served. Sometimes it is the duty of the underwriter to advise holding up an offering. Sometimes he must caution the company against overborrowing. Always he must decide the price at which the security is to be offered. This task calls for close judgment and long experience.

What would compulsory competitive bidding do to this set-up? Mr. Stanley believed that it would completely change the methods and relationships described. He itemized the objectionable features briefly as follows:

1. The banker's sense of responsibility would be minimized by competitive bidding and his professional relationship with his client destroyed.

2. There would be a strong tendency toward overpricing securities and high-pressure salesmanship.

3. The new system would encourage the production of shabby goods.

4. The joint study and coöperation in preparing SEC documents would be eliminated.

5. The small dealer would be eliminated.

Summing up, Mr. Stanley said in defense of investment bankers:

> . . . . They have been blamed because industry has not sought new capital and because investors have not come forward and put more new capital into industry. It has been suggested that if the investment banker were really doing his job, he would at the same time be persuading industry to seek new funds and investors to provide them. This, of course, leads into a discussion of the proper function of the investment banker in our modern economy, and is too broad a subject to go into in detail in this memorandum.
>
> I am convinced that the fact that new money financing has not run to larger figures in the last few years can in no way be laid at the door of the investment banker. The investment banker is not the controlling factor—the destination of savings in the last analysis is determined by forces far deeper and far stronger than any one group of men can direct, except in a totalitarian state where simple governmental decrees can force money into the particular industries or ventures deemed important by a controlling group or clique. However, I know that a great deal can be done by an active body of investment bankers throughout the nation in helping the flow of private funds into private enterprise, by furnishing sound financial advice to industry, by providing the most effective means of securing needed funds in the public markets, and by encouraging private investment by preparing and sponsoring new issues after adequate investigation.

He went on to say that there is no quicker way to defeat these ends than to turn investment bankers into a group of traders gathered around an auction block, interested only in bidding the highest price for new securities.

—F. X. W.

Weather Forecasting and the Utilities

THE following notes were collected at a joint meeting of the Pennsylvania Electric Association and officials of the U. S. Weather Bureau, held in Washington, D. C., January 19th and 20th on the subject of weather forecasting as it affects public utilities. The meeting was presided over by W. R. Hamilton, superintendent of system operations of the West Penn Power Company, and chairman of the System Operations Committee of the Pennsylvania Electric

Association. In attendance were representatives of operating utilities from various parts of the country, as well as numerous private meteorologists.

The first speaker was Commander F. W. Reichelderfer, chief of the U. S. Weather Bureau. He said it was the policy of his bureau to extend its service to meet all public needs. He believed, however, that the time is not far off when one government department will not be able to take care of all necessary weather forecasting and that it may become necessary for some businesses to maintain private meteorological experts on their staffs. For instance, he explained that if a public utility requested information as to when snowfall would begin, its probable duration and intensity, the Weather Bureau would of course furnish all data which it had gathered in the course of its regular functions. But if that utility required hourly digesting of conditions, it would necessarily have to turn to a private meteorologist for such work.

COMMANDER Reichelderfer outlined the scope of the service rendered by his bureau, using a series of maps and charts. He emphasized the importance of upper air soundings, pointing out that a high degree of accuracy can be obtained through proper analysis of such soundings in relation to surface observations.

There will never be any definite line dividing the functions of private meteorologists and the Weather Bureau, the Commander said, adding that the services of the former should be complementary to the latter.

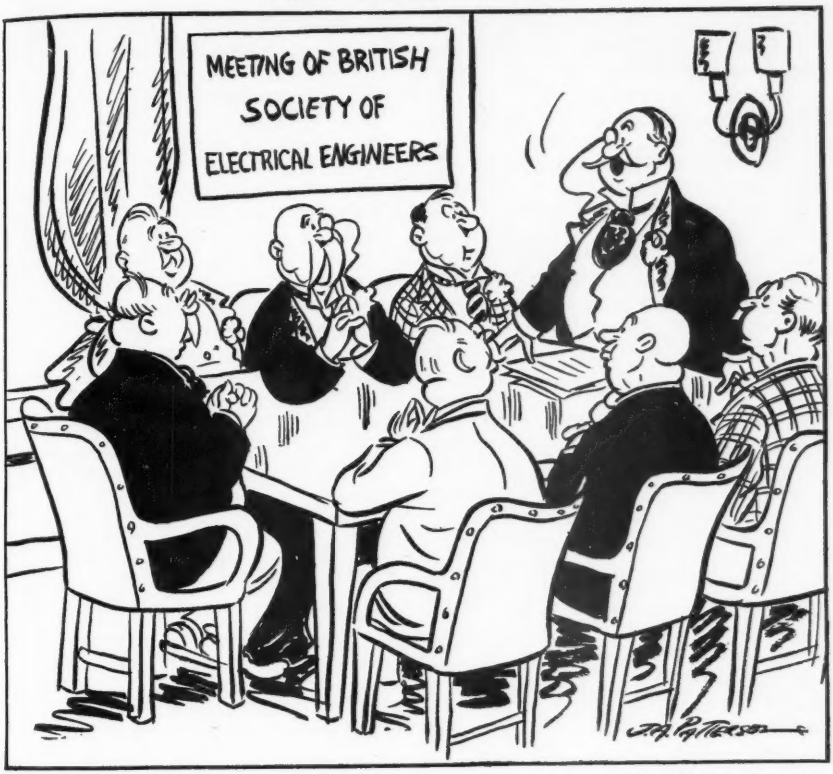
C. W. Mayott, manager of the Connecticut Valley Power Exchange, spoke on the effect of weather disturbances on utility service maintenance and the value of forecasting such disturbances. High winds, heavy rains, sleet, snow, and lightning are elements which seriously affect all operating utilities, he said. Describing the New England hurricane of 1938, he stated that it came without any public warning. During the past year, 21 outages due to winds of various intensities were recorded in New England. Foreknowledge of weather conditions, Mr. Mayott said, is of inestimable value in the field of utility maintenance.

On the subject of sleet, he explained that a correct forecast permits the utility to make preparations for necessary switch-overs and for loading certain lines to warm them up and thus melt the sleet. As to lightning, nothing much outside of lightning-proofing can be done. Rainstorms have a more serious effect on hydro stations than on steam stations, Mr. Mayott said. It is highly important for companies using large amounts of water to know as far in advance as possible about rainfall conditions.

Webb Phillips of the Pennsylvania-New Jersey Interconnection, discussed the relation between weather forecasting and load planning. He pointed out that unforeseen cloudiness of various degrees causes as high as 12 per cent error in load forecasting. Changes in temperature and humidity, he said, have marked effect on power loads.

ROBERT E. Turner, hydrographer at the Conowingo dam, described the great amount of progress that has been made in forecasting weather so as to give the greatest assistance to operators of large power dams. He said that much emphasis has been placed on the subject of flood control, but that not enough attention has been given to forecasting what is sought to be controlled. He contended that every drainage district should have a hydrologist who would be responsible for prognosticating the conditions which have to be met from day to day.

John G. McKinley of the West Penn Power Company was called upon to summarize the questions which the chairman had asked power company representatives to submit for discussion. He summarized the industry's needs, as shown by the questions and suggestions received, as follows: (1) More accurate forecasts as to rainfall; (2) more accurate and longer-range forecasts concerning general weather conditions; (3) more specific information as to the duration of unusual weather conditions; and



"Sorry, Gentlemen, But Major Potts Got Lost In the Blackout and Will Not Be Present to Read His Paper on Recent Technical Advances In Lighting Display."

(4) more frequent forecasts. Mr. McKinley said that it would be of considerable help if the Weather Bureau could step up its dissemination of weather information so that utilities could have reports that were more current. He suggested that the daily weather map might be published in the newspapers. Periodical radio broadcasting of weather information was also suggested.

A. S. Fry, representing the Tennessee Valley Authority, was asked to comment on that agency's weather problems. He said that although TVA maintains a group of forecasters, considerable difficulty had been encountered in predicting rainfall. Recently, however, the Weather Bureau has geen giving TVA forecasts thirty-six hours in advance, which have been of great assistance. The Authority, Mr. Fry said, is looking forward to further development of the service rendered to it by the Weather Bureau.

Dr. C. G. Rossby, assistant chief of research of the Weather Bureau, warned against too much optimism concerning the rapid development of accurate long-range forecasts. He explained that to accomplish such forecasts the local weather charts for the entire continental United States would have to be coördinated. He pointed out that problems of individual utilities cannot be dealt with as isolated problems, because they are invariably tied in with the basic fundamentals of every-day weather forecasting.

Merrill Bernard of the Weather Bureau outlined, with the aid of charts and maps, the procedure used in arriving at a weather forecast. A. K. Showalter and Eugene Bollay, also of the bureau, carried on Mr. Bernard's discussion by tracing the history of a number of previous forecasts by using a series of chronologically arranged weather charts.

A. B. Campbell, secretary of the Transmission and Distribution Committee of the Edison Electric Institute, spoke briefly on the developments within the industry for coping with the problems arising from the effects of wind and ice on overhead transmission lines. He explained that the safety code adopted by the National Bureau of Standards had lead to some of the developments. Studies made by his committee in coöperation with the Weather Bureau have caused some modifications of the safety code, Mr. Campbell said.

D. C. Hopper, member of the Transmission and Distribution Committee of the Pennsylvania Electric Association, outlined the work which has been done by his committee in compiling data over the past thirteen years regarding ice formations in the state of Pennsylvania.

Mr. Bernard again addressed the meeting, explaining that the Weather Bureau renders considerable aid in flood-control work. He commended the pioneering steps taken by Pennsylvania utilities in the field of flood forecasting. One of the greatest problems in connection with flood control work, he said, is the prompt dissemination of forecasts. Mr. Bernard pointed out that the bureau is anxious to coöperate with private interests which can benefit from its services, but explained that the bureau is limited to the extent that its facilities are limited.

COMMANDER Reichelderfer resumed his discussion in order to touch on certain points brought out by Mr. McKinley. He called attention to the fact Weather Bureau stations answer hundreds of telephonic inquiries every day. He said he wanted to make it clear that the development of upper air studies has not reached the stage where all forecasts can be entirely accurate. The local airport weather stations can often give valuable information as to how light conditions during the day will be affected by clouds, the Commander said.

D. M. Little, chief of the aerological division of the Weather Bureau, stated that his division maintains a 24-hour service and that the regional offices often receive inquiries from utilities. Asked by the chairman if the station at the New York city airport, for instance, would be receptive to inquiries from Consolidated Edison Company, Mr. Little said the station would be glad to furnish the company with information, but added, "We are not drumming up trade because we have our hands full with the airlines."

Dr. Irving Krick, director of the Department of Meteorology, California Institute of Technology, outlined a forecasting service which he has developed and which is presently being rendered to a number of industries, including several public utilities. As an example, he explained the service which is rendered to the Detroit Edison Company. Daily teletype reports, he said, forecast precipitation, temperature, and light conditions twenty-four hours in advance. If sudden changes in conditions occur and potentially damaging weather is discovered approaching the area of the company's system, special warnings are sent so that maintenance crews can be held in readiness. In other cases, he said, the forecasting service has advised the company to release such crews which ordinarily might have been held on overtime because of uncertain conditions.

DR. Krick explained how his service covering precipitation is rendered to a hydroelectric plant of the Commonwealth & Southern Corporation in the Coosa river watershed in Alabama. Also discussed was a similar service furnished to certain hydro plants of the Appalachian Electric Power Company.

Howard Duryea of the Alabama Power Company stated that the personnel of

his company is building confidence in Dr. Krick's forecasting service. He said the service is sufficiently accurate to be of real value to the company.

Walter G. Fielder, hydraulic engineer of the Central New York Power Corporation, stated that his company is making use of a number of small streams on which it has a series of 63 hydroelectric plants. Our company, he said, subscribes to Dr. Krick's service and while we have not as yet had full opportunity to judge its value from our standpoint, we believe the service can be worked out to be helpful to us.

S. Petterssen, professor of meteorology at the Massachusetts Institute of Technology, predicted that the time is not far off when large utilities will find it profitable to retain their own meteorologists. These experts, in coöperation with the Weather Bureau, will be able to improve the utilities' service, he said.

Mr. Petterssen warned against relying on weather forecasts for more than three or four days in advance, but added that as future developments in meteorology are made and as coöperation in transmitting weather information is developed between the two hemispheres, reliable prognostications for a week or ten days may be made.

Edward J. Minser, chief meteorologist of Transcontinental and Western Air, Inc., expressed surprise that more utilities have not made use of the services of private meteorologists. He said he thought that the many special problems of utilities in various parts of the country could not be handled through the limited facilities of the Weather Bureau alone.

In bringing the meeting to a close, Mr. Hamilton stated that utilities are apparently in need of three kinds of weather forecasting service: (1) Warnings as to all kinds of storms; (2) forecasts covering light, temperature, and humidity conditions (more particularly for the utility serving a metropolitan area); and (3) forecasts as to precipitation as it affects hydroelectric plants.

The Regulation of Dividend Distribution under The Holding Company Act

One of the reform objectives which proponents of the Holding Company Act of 1935 had in mind in promoting that legislation was the protection of small stockholders or creditors from the injudicious distribution of assets which might threaten the safety of corporate investments. The Holding Company Act, of course, affects only public utility holding companies engaged in interstate commerce and their subsidiaries.

However, in view of the persistent agitation for a general Federal incorporation statute, it is quite possible that the operation of Federal holding company regulation in this respect may some day turn out to be a model for distribution policies of all American corporations engaged in interstate commerce. At any rate, that is the larger view taken of the situation by a sympathetic anonymous writer in the January issue of *The Yale Law Journal* (volume 49, page 492).

The view taken in this article was that the need for dividend regulation has become more and more acute with the growing complexity of corporate structure. State regulation (through state incorporation statutes) was dismissed as "notoriously ineffective." Prior to the Holding Company Act the law governing corporate distributions was designed to meet the needs of a simple business community—a small corporation actively controlled or managed by a few stockholders who were generally known through creditors.

Nowadays, however, the typical large corporation is generally controlled by self-perpetuating management

with an interest of its own (in jobs, salaries, and active powers), which may not always be concurrent with the interests of the stockholders and may even conflict.

The need for protection from unwise distribution of assets arises, it is said, out of the temptation of management to create an impression of success by unsound accounting and other subterfuges indicating earnings. This may result in dissipation of needed corporate assets so as to pay regular dividends. It is suggested that voting, as well as nonvoting security holders, need such protection in this era of such widespread absentee ownership that the voting power of common shares is often more theoretical than practical.

All regulation along this line apparently stems from the historic decision of the U. S. Supreme Court in Wood *v.* Dummer, 30 Fed Cas 435 (1824). This opinion, by Mr. Justice Story, outlawed a distribution of assets to stockholders on the ground that the capital stock was a "trust fund" for the payment of all debts of the corporation —a fund, the preservation of which is relied upon by those extending credit to the corporation.

This forthright principle, however, proved vulnerable to various forms of evasion. Some state laws sanctioned dividend payments without regard to the impairment of capital so long as they were measured by current earnings. More states permitted schemes under which "capital stock" could be called "surplus." Then there was the plan of dividing amounts paid in for no-par stock between capital stock and surplus, thereby creating a "paid-in surplus," free, under some state laws, for distribution as dividends. Or, if no-par stock were not used, capital assets could be written down for the same purpose. Distribution could even be dressed up in the form of a purchase of the company's own stock. In one way or another, so long as the corporation was not rendered insolvent, the state laws did little to prevent dividend distribution so desirable for proxy hunting management.

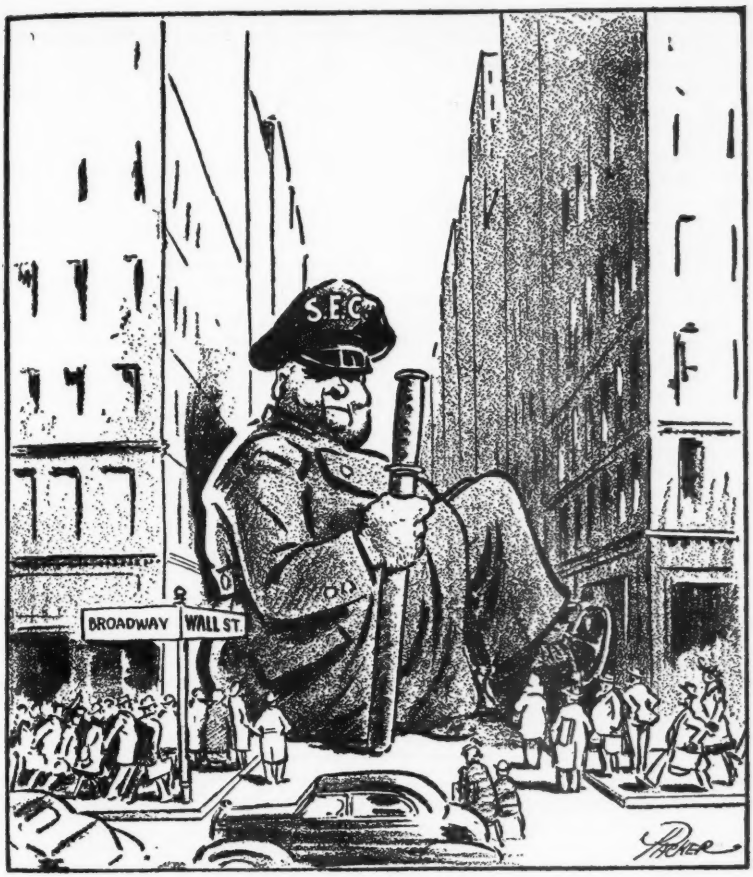
SINCE 1933 the states have attempted to plug these gaps but they still fall short of the standard laid down in Wood *v.* Dummer. Thus it appears that the rule must be supplemented by practical equipment in the form of evidence of value beyond that furnished by historical cost.

The help given by the accountant's income statements of recorded past earnings is limited. A modern system of control over distribution of corporate assets to stockholders should be designed, continued *The Yale Law Journal* commentator, to achieve for the investor the adequate capital cushion he is otherwise powerless to secure. Such a system would permit new issues of fixed obligations only when they did not furnish such a large share of the assets contributed by all investors as to run the risk of reorganization proceedings. Furthermore, where disproportionate bonded debt already exists, earned surplus might be restricted until a protective cushion has been built up.

The SEC's jurisdiction over the distribution of a corporation's assets is found in §12(c) of the Act, which makes it unlawful for any registered holding company or affiliate to declare a dividend in violation of rules worked out by the commission for the appropriate protection of the financial integrity of such company or its affiliates. There are other statutory powers given the SEC along the same line, §6(a) and §7. The *Journal* article analyzes situations which might arise and cases which have arisen in the exercise of powers by the commission under these sections.

By way of conclusion, the article stated as follows:

> The cases under § 12 (c) and those under § 6 (a) indicate that the commission has made substantial progress in developing a program to protect investors in securities of public utility holding companies and their subsidiaries from losses due to undue withdrawals of assets or improperly balanced financial structures. The level of regulation has passed far beyond that developed in the states. Every case before the commission represents a situation where the state laws offer no impediment to the issue of securities or the withdrawal of assets. Furthermore, a



The New York Mirror

BLOCKING TRAFFIC

system operating through the prevention of distributions by "licensing" provisions is calculated to be infinitely more effective than one which can be enforced only by remedial action after the distributions have been made.

A careful scrutiny of the cases, moreover, reveals that the commission is appraising each situation from a highly practical viewpoint. Consideration of the existence of liquidation preferences on the preferred shares, of unsettled business conditions, pending litigation, and adequacy of earning power, of liquidity of assets, ratio of debt to assets, and soundness of accounting methods, makes each case an inquiry into the needs and structure of the particular business. The proceeding is designed, in terms of the particular facts of the case, to protect the investor adequately, while granting the corporation the flexibility required for legitimate corporate purposes.

It is this emphasis on individual analyses which is said to explain the deviation of particular decisions from the absolute standard of the rule against impairment of assets. Thus, in cases involving refunding bonds and preferred stocks, the position of the SEC has generally been in excess of the requirements

of the rule of Wood *v.* Dummer. An example of this was the 15 per cent added cushion required by the commission in the so-called North American Case (decided January 30, 1939). On the other hand, the Public Service of Colorado Case (decided August 24, 1939) permitted lower standards because of the financial strength of the corporation.

There has been some criticism of the commission's leniency in these and other cases. The *Journal* commentator does not seem to agree with the position sometimes taken by the SEC that it should tread lightly in refunding situations. The article states on this point:

> More susceptible to criticism than alleged practices of leniency are two policies of the commission which may tend to recur. One is the predilection of the commission to side-step an absolute valuation of the assets and an absolute decision on the propriety of the corporate program. Thus, in the Columbia Gas Case [January 25, 1939], the ultimate approval of the reduction was left to the vote of the stockholders. The commission is well aware of the ineffectual power of the proxy machine to effectuate the desires and interests of the stockholders.
>
> Worthy of serious reëxamination, also, is the commission's attitude that although there is a strong presumption against the payment of dividends out of capital or unearned surplus, there are less serious obstacles to permitting the payment of dividends to preferred stockholders while common capital is impaired than to permitting payments to common stockholders. In its cases under § 12 (c), the commission may have been justified in permitting preferred dividends out of capital surplus, when the financial position of the declarant was sound and the impairment was a result of accounting manipulations, or when the need for reorganization was clear. But in its decisions under § 6 (a) the commission has also consistently imposed restrictions upon common stock dividends but none upon preferred without expressly considering these factors. Unless the commission clearly analyzes the rights of the common stockholder in each case, the latter may suffer irreparable injury, when dividends to preferred shareholders so weaken the financial structure that the full impact of the bankruptcy law is visited on the junior equities.

THESE are isolated matters of criticism. But the commission's administration, on the whole, is looked upon as a distinct advance. The *Journal* commentator concluded that the control of corporate distributions generally is peculiarly fitted to Federal jurisdiction. Reform of the state laws was said to be of doubtful validity because as long as one corporate "Reno" remains, the regulatory efforts of the other 47 states would be rendered nugatory.

Notes on Recent Publications

CONSERVATION AND RURAL ELECTRIFICATION. Address by Harry Slattery, Administrator of Rural Electrification, at meeting of National Lawyers Guild. Washington, D. C. December 19, 1939.

In helping to improve some of our farming methods and to increase in some measure agricultural income, rural electrification contributes, in a broad but very real sense, to the conservation of agriculture as a basic resource of our national life, according to Mr. Slattery. He said that is why REA, in bringing electricity to rural areas, fits into today's broad movement to conserve American agricultural resources.

Touching upon the present scope of the Federal rural electrification program, Mr. Slattery pointed out that REA systems alone thus far have taken electricity to approximately 400,000 farm families in 44 states. In a forty-fifth state, New Hampshire, a system has just been started. In the four and a half years since REA was established, he said, "through the efforts of REA and of the utilities, electric central station service has been made available to more farm people than in the preceding three decades since rural electrification had its beginnings in the United States early in the century."

THE STORY OF THE LAMP AND THE CANDLE. By F. W. Robin. Oxford Press. New York, N. Y. Price $5.

An historical narrative in popular and entertaining style about the development of artificial lighting since the time when a prehistoric savage first noticed a lump of twisted hair continue to burn in a puddle of fat near his cave fire to the advent of gas and electricity. The book is full of interesting little nuggets of information, such as the fact that some houses were lighted by candles as late as 1887 and that gas lighting really preceded the "old-fashioned" kerosene lamp in most metropolitan centers.

The March of Events

Seeks Tax Replacement

GOVERNMENT ownership of power has left the state of Tennessee with a revenue loss which, according to Governor Prentice Cooper, threatens to bankrupt a number of counties as well as upset badly the fiscal affairs of the state itself.

Appearing as an advocate of legislation to replace a part of the tax loss, Governor Cooper told the House Military Affairs Committee recently that about 90 per cent of the electric utility properties in the state, until recently an important source of revenue, has been taken over by the Tennessee Valley Authority, municipalities, and coöperatives and thereby removed from the tax base.

This, Governor Cooper testified, has created a "difficult and vexing problem." The state, he said, can assume a part of the loss, but does not have the "means" to absorb it all even if the tax structure were altered in important respects.

At the same time, using TVA figures, Governor Cooper told the committee that the public ownership program saves power consumers more than $7,500,000 annually, or over twice the amount of the state's tax loss, which he estimated at approximately $3,000,000.

Representative May, Democrat of Kentucky, chairman of the committee and outspoken critic of the TVA, observed that this situation "makes it difficult for this committee to go on the floor and convince the House that a bill of this kind ought to pass."

The plight of some of the areas in the TVA region was graphically portrayed by W. H. Fargason, superintendent of schools in Fannin county, Georgia. Mr. Fargason testified that the purchase of the Tennessee Electric Power Company by the TVA removed the major source of revenue in his county. He pointed out that up until the TVA purchased TEPCO, the privately owned utility paid $60,000 of the $75,000 per year in taxes collected by the county. The school in the Morganton school district would have to be closed, he said, because TEPCO had paid $2,500 of the $3,200 collected by this district. A number of counties in Tennessee have suffered in a similar, but somewhat less degree, by the TVA, municipalities, and coöperatives taking over properties that once served as an important source of revenue.

The bill before the committee would establish a formula under which the TVA would replace most of the ad valorem taxes lost by the states in which it operates. These payments in lieu of taxes would come out of the TVA gross revenues. The formula provides that the payments would amount to 10 per cent of gross receipts in 1941 and that the percentage would decrease gradually until it reached a flat 5 per cent rate after 1948.

Hostility of the House Military Affairs Committee was emphasized when Representative Charles I. Faddis, of Pennsylvania, proposed a new program which would completely upset the Norris-Sparkman plan for state and county reimbursement.

Faddis, a New Dealer and heretofore an advocate of the TVA program, proposed that the wholesale rates on power charged by the TVA be increased, in effect, 100 per cent, and that the proceeds be applied three ways: First, to national defense, such as manufacture of nitrates; second, retirement of the public debt; and third, solution of the tax problem in states and counties, and that any residue thereafter be paid into the Treasury.

Governor Cooper, asked as to what he thought of the proposal, was emphatic in his rejection of it, saying that he felt that the best results could be obtained from the TVA by carrying out the present program.

Ickes Reports

COMPLETE approval of the Department of the Interior was given the proposed Kings Canyon National Park last month in the annual report to the President of Secretary of Interior Ickes.

Declaring that "there is no more important national park project before the country today," Ickes reviewed the legislative progress of the bill introduced last year by Representative Gearhart, Republican of Fresno, but expressed disapproval of a committee amendment which provided for a power project within the park.

Ickes said this was wholly unnecessary, "since both the Commissioner of Reclamation and the chief of engineers, United States Army, stated that the most feasible power and irrigation reservoir sites are outside of the proposed park, and their plans do not include the development of sites within the park."

Secretary Ickes subsequently made public a report by Bonneville authorities on the feasibility of a steel industry which could use electric power generated at the project on the

Columbia river. The Bonneville Administration in Oregon was said to be negotiating with several iron and steel concerns regarding possible establishment of a steel industry in the Pacific Northwest to meet normal West coast demands in addition to special markets created by the expanded national defense program.

The report was based on a survey of raw materials and commercial markets available not only in the Columbia river area but also at the Grand Coulee project in Washington.

The Bonneville Administration recently took the initial step in a proposed broad economic-industrial survey by inviting more than 50 Northwest civic organizations to coöperate in preparing an inventory of sites immediately available for new industries. The invitation went to cities located along power lines already completed by Bonneville. These include Columbia river communities west of The Dalles and towns of the lower Willamette valley. "This first, fast inventory will be followed immediately by similar surveys," Ivan Bloch, Bonneville's market development chief, declared.

Bloch urged leaders in the communities in which the invitations were addressed to form local committees to gather detailed information on the location and size of industrial sites, type and cost of available transportation and labor, fuel supplies, existing local industries, and taxes. He said Bonneville would set up a simplified standard procedure to be used in collecting and compiling the information.

Arkansas

Commissioner Dissents

A MAJORITY of the state utilities commission has placed a penalty of 37.5 cents a month on 44,000 customers for the benefit of three industrial consumers, Commissioner Max A. Mehlburger charged recently. The charge was made in a dissenting opinion on the majority's order permitting a new gas company to serve industries at Okay and Hope. All the industries had been customers of the Arkansas Louisiana Gas Company.

Commissioners Thomas Fitzhugh and H. W. Blalock wrote the majority opinion several weeks ago (see PUBLIC UTILITIES FORTNIGHTLY, February 1, 1940, p. 189) authorizing the Louisiana-Nevada Transit Company of Ada, Okla., to build pipe lines parallel to those of the Arkansas Louisiana.

Commissioner Mehlburger based his charges on the outcome of an investigation of the Arkansas Louisiana's rate structure which has been in progress for about two years. He said he was "convinced that rate reductions" over the entire system in Arkansas "will be made" after a hearing. He said:

"The net revenue loss [to the Arkansas Louisiana] by the severance of these three industrial customers has been estimated at $197,900 per year. The final rate reduction found by the department will be decreased by at least this amount, which will mean that on an average each of the 44,000 other customers of the company . . . would pay a monthly bill which would be 37.5 cents higher than it would have been had the application [of the Louisiana-Nevada] been denied."

Mr. Mehlburger said this calculation did not consider any further decrease in industrial revenue which will "necessarily occur" by reduction of rates to other industrial customers to a level comparable to those established by the Louisiana-Nevada.

The Arkansas Louisiana Gas Company on January 18th filed an application with the state utilities commission asking a rehearing of the order authorizing the competition. Under the 1935 utilities commission law, the Arkansas Louisiana may appeal to the Pulaski Circuit Court and from there to the Arkansas Supreme Court if its petition is denied.

State Seeks Gas Market

WITH Arkansas' newest gas field reported shut down because there is no market for the product, the state utilities commission recently announced it was seeking a conference with the Oil and Gas Commission to discuss the feasibility of having Arkansas gas distributed within the state.

The utilities commission announced some time ago that it believed major companies should distribute Arkansas gas if it could be serviced at a price comparable to that paid for the product brought in from other states. Most of the natural gas now distributed in the state is piped from Louisiana, Texas, and Oklahoma.

Chairman Thomas Fitzhugh of the utilities commission wrote Chairman O. C. Bailey of the Oil and Gas Commission:

"We are particularly interested in helping in any way to find a market for gas that is now being produced in south Arkansas and more specifically in the Magnolia field. We believe that benefit would come to the producer and the consumer in this state through coöperative effort between your commission and this department."

Agree to Lower Rates

THE Oklahoma Gas & Electric Company will reduce electric rates to its Arkansas customers 7 per cent, effective on March 1st billings, and the Arkansas Utilities Company slashed its electric rates in three cities ap-

proximately 10 per cent, effective with February 1st billings, the state utilities commission announced last month.

Chairman Fitzhugh said agreements to the reductions were obtained by the commission after a series of conferences.

The Oklahoma Gas & Electric Company serves Fort Smith, Van Buren, Ozark, Alix, Alma, Altus, Branch, Charleston, Hartman, Lavaca, Lamar, Mulberry, and Scranton, all in western Arkansas. Reductions by the Arkansas Utilities Company affected Helena, West Helena, and Marianna customers.

The latter company's water rates to Helena consumers were reduced 6.3 per cent, effecting savings totaling $3,703 annually on the basis of 1938 consumption, effective on February 1st billings under the agreement.

Based on 1939 revenue figures, the Oklahoma Gas & Electric reductions will save consumers a total of $45,368. On the basis of 1938 revenue figures, the latest available, reductions for Helena, West Helena, and Marianna electric customers under the new schedule of the Arkansas Utilities Company would effect savings totaling $23,892.

California

Hetch Hetchy Appeal Granted

THE U. S. Supreme Court on January 29th agreed to review an appeal by the Secretary of the Interior in the name of the United States from the decision of the U. S. Circuit Court upholding the right of the city of San Francisco to obtain power from Hetch Hetchy dam and distribute it through the alleged "agency" of a private utility company. The Interior Department contends that the Raker Act by which Congress authorized the use of Hetch Hetchy power by the city of San Francisco precluded the distribution of the same by any other means than a public agency. The U. S. District Court upheld the Secretary of Interior on the original injunction proceedings, but the U. S. Circuit Court of Appeals had sustained the contention of the city of San Francisco.

The interest of the Federal government in the situation arises from the fact that the city built Hetch Hetchy dam on national park property. The city contends its practice of turning over the power to Pacific Gas and Electric for distribution as its agent does not violate the Federal statute.

Suggests Power Districts

HAROLD L. Ickes, Secretary of the Interior, on January 21st informed Governor Colbert L. Olson that if California desired to purchase the electrical output of the Central Valley reclamation project it would have to establish local power districts or other proper distribution organizations. Mr. Ickes wrote the governor:

"I shall consider the state or its authorized agency ready to negotiate with the United States for the purchase of power from the project when it has a suitable market for power. I should, however, consider the state in the preferential market for power only to the extent to which it was prepared to market that power directly to consumers or among public power agencies."

Governor Olson had asked Secretary Ickes to outline the government's position concerning disposal of power and water from Shasta dam in the Central Valley project, which is expected to be completed by 1943.

Secretary Ickes wrote that "it seemed clear" that the state should be prepared to finance the local power districts or enact legislation permitting them adequately to finance themselves.

On the question of water distribution, Mr. Ickes said the policy of the Reclamation Bureau was to delegate to local irrigation interests the operation of "features of projects which serve them directly with water, provided proper organizations, thoroughly representative of all the local interests involved, are in a position to assume and to discharge the responsibilities thus imposed."

Applying these policies to Central Valley, Mr. Ickes added, "the Bureau of Reclamation will operate, for example, such features as Shasta dam, reservoir and power plant; the after bay and power plant, if any, which may be constructed, and Friant dam and reservoir."

Central Valley proponents of publicly owned power-marketing facilities sustained a setback on January 24th through the lack of a single vote in the state Water Project Authority. Divided, 2 to 2, with one member absent, the board failed to adopt a resolution approving a draft of an amendment for submission at the January 29th special session of the state legislature.

The deadlock terminated two days of a hearing on the proposal, stoutly championed by Director of Public Works Frank W. Clark, to amend the Central Valley Act to release $50,000,000 of the authorized $170,000,000 bond issue. Part or all of the $50,000,000 would be used to finance and promote publicly owned distribution systems.

The deadlock left the supporters of the power amendment only one hope for action at the special session. It was that Governor Olson might include the subject in his special session call despite the failure of the water authority to recommend it.

District of Columbia

Washington Plan Works Again

THE District of Columbia Public Utilities Commission has allocated approximately $575,000 for the 1940 electric rate reduction—the thirteenth consecutive reduction under the sliding-scale, profit-sharing agreement known as the Washington plan. However, the amount allocated was somewhat in excess of $100,000 more than the local electric company, the Potomac Electric Power Company, originally estimated should be allocated for the 1940 reduction.

There was also some difference of opinion to be ironed out as to whether the entire reduction should be allocated to commercial consumers. The commission indicated early this month that probably 27 per cent of the reduction would apply to residential consumers, with the balance going to commercial consumers.

Each year the commission adjusts the consumers' rates of PEPCO in accord with the sliding-scale plan, in operation for many years, which permits a rate cut whenever the profits of the company exceed an initial rate of return of 6 per cent on an agreed valuation.

On the basis of final tabulation by the commission as to details of expenses and receipts for the past year, there was an excess of over $1,000,000 above the basic 6 per cent rate of return (which worked out at $575,000 for the consumers' share). The company had not definitely indicated whether it would prosecute any protest over the difference between its estimation of the excess profits and the commission's estimate.

Kansas

Get Voluntary Reduction

RESIDENTIAL and commercial customers in Topeka and suburbs will benefit from another voluntary reduction in the price of electric service, effective with billings on and after March 1, 1940, according to an announcement made recently by Deane Ackers, president of the Kansas Power & Light Company.

This made the sixth major reduction in the price of Topeka's electric service since 1928. The average cost of residential and commercial electric service to the consumer has been reduced between 40 and 50 per cent since the latter '20s. The new prices are based on quantity consumption—the more one uses, the less the average cost per kilowatt hour. Mr. Ackers stated:

"The company in effecting these lower prices is carrying out a long-range program which was established more than ten years ago, of sharing with its customers the benefits resulting from operating efficiencies and increased use of its service. When this program was commenced, we believed that by periodically establishing the prices of our service at lower levels consistent with sound business practices, that the advantages of full use of electric service would be made available to more of our customers. It is gratifying to know that such has been the case and that the plan has been justified. As a result, our customers have been saved many thousands of dollars over the period in question. This has been accomplished during an era when the prices of the majority of commodities have increased."

Michigan

Loses Test Case

THE Federal government scored a victory last month in what was considered a test case of whether Federal authorities may prosecute a public utility which furnishes service to a law violator.

A jury in Federal court returned a verdict at Detroit convicting the Consumers Power Company and two of its representatives on a charge of conspiracy to violate internal revenue laws. Testimony in the trial was that Consumers Power served gas to illegal distillers in nearby Macomb county. The two representatives convicted were Ralph W. Clark, district manager in Mt. Clemens, and W. A. Bertke, district engineer.

Clark had testified he was aware of at least one instance in which gas was delivered for illegal distilling purposes, but he said he believed the company was obliged to serve whoever applied and abided by regulations.

Holding the government failed to prove intent to defraud against the company, Clark, and Bertke, the defendants on January 23rd appealed to the circuit court of appeals at Cincinnati their convictions on charges of conspiracy to violate the internal revenue laws.

Missouri

Refuses to Sell Wholesale

THE Union Electric Company recently refused to supply electricity at wholesale to the city of St. Charles for distribution through a municipally owned system, one of the proposals submitted to the company by Mayor Adolph Thro in negotiations concerning rates and purchase of equipment.

It was explained by the company that it had 660 customers outside the city limits, receiving electricity over the same distribution system in use in the city, and that rates to these customers would have to be increased greatly if the company lost its patrons in the city. The city's proposal would have set up an arrangement similar to one used in Kirkwood, where the municipal government buys electricity from the company at wholesale rates and sells it in turn to property owners.

In reply to another proposal by the city of St. Charles, asking for a new bid for supplying street lighting, the company offered the city a rate $1,684 a year less than now paid. The company now supplies equipment and electricity for 318 street lights at $8,439 a year; the new offer is to supply the same service for $6,753 a year.

The company also had been asked to supply figures at which it would sell the street-lighting equipment to the city, for operation as a municipally owned distribution system. It offered the equipment, including wiring, lights, transformers, and switchboards, at $16,340, plus a rental of $976 a year for poles and cross-arms.

Tax Rise Bill Passed

ORDINANCES to increase license taxes of busses and service cars were passed by the St. Louis board of aldermen last month. The increase on busses, estimated to cost the Public Service Company an additional $70,000 annually, is from 3 per cent of gross receipts to 5 per cent. On service cars it is from an average of about $8 a year to a flat rate of $25, estimated to swell city revenue by $6,800 a year.

With five members absent, the vote was unanimous on the bus bill, but one alderman voted against the service car measure, saying he had been told some of the drivers did not clear more than $10 a week. The board amended this bill to cut the charge from $100 a year.

Bus lines operating partly in the suburbs will be taxed only in proportion to the city sections of the routes. Busses also pay a separate tax of $25 a year for vehicles carrying forty passengers or less, or $50 for larger ones.

Nebraska

Approves Power District

C. B. FRICKE, president of the Loup River and Consumers Public Power districts, recently voiced qualified approval of plans by a Lincoln group to form a public district for acquisition of the Iowa-Nebraska Light & Power Company. He commented:

"If the men promoting the organization of a district at Lincoln are really in sympathy with the public power program in Nebraska, and if their objective is to give cheaper electricity to the people, we are heartily in favor of their organization to acquire the Lincoln properties of Iowa-Nebraska."

Petitions for formation of a Lincoln district (to be ready if Iowa-Nebraska properties are offered for sale) were being circulated in Lincoln late last month.

L. R. King, president of the Iowa-Nebraska Light & Power, recently issued a statement, which stated in part as follows:

"Because of recent inquiries which have come to me, it seems desirable to restate the position of this company with respect to the sale of its property or any part of it. In the first place, since the negotiations to sell our Nebraska electric properties to the PWA hydroelectric districts were called off in January, 1939, there have been no negotiations for the sale of any of our utility properties, nor are there any such negotiations pending or contemplated.

"As a matter of fact, we are now completing a construction budget for 1940 which means the expenditure of nearly three-quarters of a million dollars for replacements and improvements to our power houses, transmission lines, and distribution systems, both gas and electric. If we expected to sell our property we certainly would not expend this amount of money for improvements in our property and for service to our customers."

Ask No More Allotments

COLONEL E. W. Clark, acting commissioner of public works, declared recently that the three major Nebraska hydroelectric districts, whose representatives conferred with Public Works Administration officials at Washington last month, "have made no request for additional allotments."

He declared the attitude of the PWA toward

an arrangement of joint operation between the three districts is "sympathetic, as it will not only conserve water to the state, but will have favorable effect upon the government's position as bondholder."

He explained "the public power districts of Nebraska last October by resolution of their boards agreed to operate in connection to effect conservation and economies. Since that time they have been working on an agreement to this end and . . . have brought a tentative plan to the Public Works Administration with a request that such modifications be made in the terms of the bonds as will permit such operation. An agreement has been reached on general principles, but final details remain to be worked out."

Representatives hope to obtain extension of maturity dates on bonds, it was said.

Company Declines Sale

THE Northwestern Public Service Company declines at this time to negotiate for sale of its properties at North Platte, company President A. B. Sanborn informed Guy C. Myers, New York financier, by letter made public last month.

Myers was authorized by the city council to seek negotiations with the company for possible sale to a consumers' district. Sanborn wrote:

"We believe the sentiment opposing sale of our property has not changed since our negotiations were terminated something over a year ago and until we are satisfied that the people of North Platte wish us to dispose of our property it would appear fruitless to negotiate with you for the sale."

New York

Efforts to Create State SEC Renewed

A RENEWED effort was begun last month for the creation of a state securities commission, modeled somewhat after the Federal body and having adequate power to regulate all those selling securities to the public within the state. Robert F. Wagner, Jr., Democrat, introduced a bill along these lines in the state assembly, and Senator John T. McCall was planning to offer a companion measure in the upper house.

However, observers were unwilling to concede the legislation much success. A similar bill was sponsored by Senator McCall last year and it was regarded as likely that the present measure, because of its controversial nature, would be left untouched in committee in the interests of a short session and legislative "harmony."

The present New York law, generally known as the Martin Act, provides penalties for fraud but gives the attorney general's office which administers it no supervisory powers. This bill confers upon the new commission preventive as well as punitive control over the field covering those who issue as well as those who sell securities.

Asserting that enactment of the measure would coördinate state regulation with the Federal Securities Act and the Securities and Exchange Act, Assemblyman Wagner denied that his proposal would involve any duplication by the Federal and state agencies.

The state SEC would be a bipartisan agency consisting of three members appointed by the governor with advice and confirmation of the senate. They would have 3-year terms and would have power to conduct investigations, administer registration of brokers, and take any other necessary steps to carry out the purpose of the act.

Ohio

Offers "Way Out"

POINTING out that Cleveland's three pending utility franchise controversies—with the Cleveland Railroad Company, the East Ohio Gas Company, and the Cleveland Electric Illuminating Company—would ultimately cost the taxpayers and the companies' customers at least $1,500,000, the Citizens League, in a bulletin released last month, advocated a sliding-scale plan of fixing utility rates and returns on capital in order to provide service at cost.

Such a plan, the league said, would entail these salient features:

1. A franchise grant by the city under which the city and a utility company would agree on the latter's capital value as a basis for determining rates to be charged and dividends to be paid.

2. Supervision of utility services by the municipality to the extent necessary to see that service is satisfactory and that accounts are kept properly.

3. A rate control fund as a "barometer" to determine when rates should go up or down at fixed periods.

4. Provisions permitting an increase in rates of return on stock under certain conditions as an inducement to prudent management.

Although recognizing that some utility companies have presumed upon their franchise rights to exploit the public, the league said it believed that "this charge of selfish and short-sighted policy on the part of utility companies is probably less applicable to the three Cleveland companies now negotiating franchises than in most cities of the country."

Ask Right to Vary Rate

THE Ohio Edison Company of Akron recently asked the state utilities commission for authority to vary industrial rates with coal prices and tax fluctuations "probably because of the European war."

The firm seeks to add to its rate "any new or increased tax" in all its divisions, and to increase or decrease kilowatt-hour tariffs .0075 cents for each 10 cents a ton variation in coal costs above $2.10 or below $1.60 in the Akron and Youngstown divisions, and over $3.90 or below $3.10 in the Springfield division.

Any variation between sums specified in each case would not affect rates. The company asserted that the change would "not add any profit" to operations, and would affect only 280 of its 199,000 customers.

Gas Schedule Approved

A NEW rate schedule for the Ohio Fuel Gas Company, to be applied to rural areas in Cuyahoga, Medina, Richland, Crawford, Marion, Wyandot, Hardin, Allen, Wayne, Holmes, Ashland, and Lorain counties was approved last month by the state public utilities commmission.

Principal feature in the new schedules was reduction from $1.50 to $1 of the minimum monthly charge. Net rates for use of gas remained unchanged for those who pay bills promptly. For instance, the new schedule charges 15 cents a hundred for the first 1,000 cubic feet, or $1.50, and provides a penalty of 5 per cent and not less than 10 cents for delayed payment. The old schedule set up a charge of $1.55 for the first 1,000 cubic feet and allowed a 5-cent reduction for prompt payment.

The new schedule also provides a charge of 6 cents for the next 9,000, 5½ cents for the next 190,000, and 5 cents for all over 200,000.

Oklahoma

Electric Rates Cut

AN annual reduction of about $500,000 in electric rates by the Oklahoma Gas & Electric Company, effective March 1st, was agreed to last month by a majority of the state corporation commission, Reford Bond, chairman, announced recently. Bond said he understood $200,000 of the voluntary reduction would be a saving on bills of Oklahoma City consumers served by the company. There was no confirmation of the figure from the company, however.

The reduction affects the 206 cities and towns in Oklahoma served by the company. Rate schedules were yet to be worked out.

Chairman Bond and Ray O. Weems, who form the controlling majority of the state commission, negotiated for the reduction and made the announcement along with a statement by company officials.

Similar negotiations were reported under way with the Public Service Company of Oklahoma.

GRDA Granted Extension

A 60-DAY extension to March 26th for completion of the $20,000,000 hydroelectric project was granted to the Massman Construction Company last month by the Grand River Dam Authority.

The Authority also granted more time to Public Works Administration officials for study of qualifications of T. E. Thompson, Shawnee city manager, proposed by the GRDA for general manager. Final approval for the GRDA's first power contract, with Chelsea, was withheld pending assurance any savings in power costs would be passed on to consumers. Chelsea operates a municipally owned system.

Oregon

Hearing Delay Asked

ATTORNEY Harry M. Kenin and the group which recently petitioned for a public hearing on Portland's newly reduced power rates last month advised Public Utilities Commissioner Ormond R. Bean that they are willing to delay the hearing until the rate revision has been completed.

Portland General Electric Company and Northwestern Electric Company recently announced a new schedule of domestic rates, but have not yet announced new commercial rates.

Bean asked Kenin to specify whether the petitioners wanted the hearing to cover domestic rates alone or both commercial and domestic rates, and Kenin's letter was in reply. Kenin wrote:

"We do not desire to proceed piecemeal and are content to await the presentation of rates in final form. We trust that your office, which is charged with protecting the public, will not permit the public utility companies to act in a dilatory fashion. Should the private utilities attempt to unnecessarily delay the publication of rates for political reasons, your petitioners will urge your office to set an immediate date for a hearing."

The state hydroelectric commission recently reported that citizens of Portland could go into the power business at a cost of $32,000,000 and effect "a substantial reduction in rates."

The 56-page report on the advisability of creating a Portland People's Utility District was issued by Chairman George W. Joseph. It said:

"An analysis of the estimated annual costs and annual revenues under the level of rates in effect August 31, 1939, as set forth in the engineering report, would seem to indicate that there is sufficient surplus under the conditions indicated to make possible a substantial reduction in rates.

"Rate reductions would normally be made only when justified by the financial condition of the district, and after the accumulation of reserve funds to care for possible emergencies. In this connection it should be remembered that part of the amounts paid in by consumers would be going toward debt retirement."

Harry M. Kenin, chairman of the Bonneville-for-Portland Committee which requested the report, announced that petitions to insure a PUD vote in the May 17th primary would be circulated immediately.

Franklin T. Griffith, Portland General Electric president, charged the state hydroelectric commission's report on the feasibility of the Portland Public Utility District was "utterly foreign to equity and fair dealing." Griffith said the commission proposed a "surgical operation" removing "the head, legs, and arms" of the private utility, to be replaced by tax-exempt Federal government facilities.

Rejects Bonneville Offer

THE Eugene water board, which controls the city's municipal power project, voted last month to proceed with construction of a $510,000 steam stand-by plant. The action was coupled with the decision to reject offers of Bonneville dam power over the new distribution line built from Vancouver, Wash., at a cost of $2,000,000.

The water board has frequently asserted that it would be cheaper for the city to build and operate the additional generating facilities than it would be to purchase Bonneville power for its residents.

The Bonneville Administration had counted on Eugene sales to aid in its load-building program. The action was said to climax a period of bitter controversy between the city and Bonneville Administration representatives, who were pushing the use of the Federal agency's service. Fear of the loss of independence in the conduct of its utility operations also was believed to be a factor in the city's determination to reject Bonneville power.

Bonneville Administrator Raver said the government's transmission line from Bonneville dam to Eugene is "fully justified" despite the city's failure to execute a power contract. He stated:

"If the city can generate power in a new steam plant at a lower cost than we can deliver hydroelectric power, it should build the steam plant. Personally, I do not believe it can be done."

Last month the cities of Monmouth and McMinnville executed 20-year contracts with the Bonneville Administration, the former for purchase of 400 kilowatts of energy and the latter for the sale of 1,000 kilowatts of firm and varying amounts of surplus energy. Delivery will be made to Monmouth as soon as the city has acquired or purchased a distribution system. The McMinnville contract will become effective upon ratification by the voters under a provision in the city's charter.

Pennsylvania

Company Reduces Rates

THE state public utility commission on January 24th announced the Keystone Public Service Company, operating in Crawford and Venango counties, had agreed to reduce rates in the amount of $120,800 a year, effective on all billings resulting from meter readings after February 15th.

The new rates will be: First 10 kilowatt hours, 75 cents; next 30 kilowatt hours, at 5.5 cents; next 85 kilowatt hours, at 3 cents; and all over 125 kilowatt hours, 2 cents.

The Harrisburg residential rate is 75 cents for the first 7 kilowatt hours; 5.5 cents apiece for the next 60; 3 cents apiece for the next 63; 2 cents apiece for the next 120; and 1.5 cents apiece for all others.

Tennessee

Appliance Promotion Cut

It was reliably learned recently that the Nashville Power Board would cut drastically its budget for sales promotion in the electrical appliance field. Nashville Electric Service is spending approximately $112,000 annually in promotion work, field work, and advertising to aid appliance dealers in sales increases and to stimulate additional use of the heavier electrical appliances.

The board will probably cut this budget nearly in half, it was learned. Members of the board and General Manager James Carnes, however, have expressed themselves as not in favor of any curtailment of newspaper advertising. They have indicated that, in their opinion, the newspaper advertising has been the most effective of the advertising media.

The board has had several discussions with representatives of appliance dealers relative to the local sale of appliances, and had refused any definite commitment to dealers that NES would stay out of the appliance field, it was said.

Sales of power to homes dropped slightly for December as compared with November, 1939, reports showed. Commercial and industrial power consumption showed an increase, but the use of power by residences was said to be far short of the 92,000,000 kilowatt hours forecast by the TVA for NES' first year of operation.

At a recent round-table discussion between a committee of electrical appliance dealers and members of the Nashville Power Board, it was suggested that NES buy electric water heaters at wholesale prices and "lend" them to low-income power users to increase general power consumption.

Texas

Gas Rate Cut

Reduction of 5 cents per thousand cubic feet in gas rates affecting Lubbock and 40 other Panhandle and South Plains towns served by the West Texas Gas Company was announced last month by Ray F. Finchey, vice president and general manager of the company, whose office is in Lubbock. The reduction, the third made within the last four years, will be a saving of $100,000 a year to patrons served by the company. The cut became effective with the January bills.

The first 2,000 cubic feet carries a minimum, with the next 48,000 cubic feet being reduced from 50 cents to 45 cents.

Washington

Bonneville Acquires Property

The Bonneville Power Administration on January 22nd acquired the Willapa Electric Company's 66,000-volt transmission line in northern Pacific county, and its substation on the outskirts of the city of Raymond. It was Bonneville's first purchase of a private utility property for incorporation into its own Northwest power grid.

At the same time, Pacific County Public Utility District took over the Willapa Company's retail distribution lines and became the third Washington PUD actually to acquire a private utility system for the sale of power to farms, homes, and business in its area.

The transfer was the result of a 3-way contract executed in March, 1939, between Bonneville, the Pacific district, and the Willapa Company. The Willapa Company received a check for $136,000 from Bonneville. The balance of $20,000 will be paid to the company by Bonneville as soon as remaining minor details of the transaction have been handled.

Rate Cut Slated

Grays Harbor residents in rural sections of the county will be the first to receive cuts in public power rates, Robert W. Beck, manager of the public utilities district, said recently. The PUD announced it would not charge farmers for extending power lines to their property and would charge commercial power users in rural areas the same minimum billing charged city consumers for like service.

In all other respects, the same rate schedules in force under the Grays Harbor Railway & Light Company have been adopted, at least temporarily, by the district.

The action on rates was in the form of a resolution adopted by commissioners regulating the use, sale, and prices of electric current applicable throughout the entire area served by the company, and was effective as of January 15th, the date the PUD acquired the holdings.

Transferring of facilities from private to public ownership prevented an immediate rate reduction, Beck said.

The Latest Utility Rulings

Holding Companies Not Entitled to Exemption As Predominantly Public Utilities

THE Securities and Exchange Commission, in two recent cases where exemption from the Holding Company Act was denied, disposed of several theories advanced to support the exemption claim. These applications were made under § 3 (a) (2), which relates to holding companies which are predominantly public utility companies operating in the state of organization and in contiguous states.

In each of these cases the commission considered the relative size of the subsidiaries and their business as compared with the size and business of the applicant. In one case, the investment of the holding company in its subsidiary was approximately 11.75 per cent of the total assets of the holding company and the subsidiary. The commission refused to regard these figures as determinative, however, since it was said to be common knowledge that control over extensive operating facilities may be obtained through a minimum of investment.

Large gross income from utility properties compared with relatively small interest and dividends received from utility subsidiaries was not considered, alone, a sufficient ground for exemption. The commission said that even though a holding company derives a relatively small proportion of its income from equity securities of operating companies, it may, by virtue of the equity securities which it holds, control a far-flung system of utility property.

In both of these cases the commission followed earlier rulings that the mere fact that an applicant might now be subject to many of the sections of the Act, because of its being a subsidiary of a registered holding company, does not empower the commission to grant exemption as a holding company unless it comes within those provisions authorizing exemption.

In the West Penn Power Company Case the commission refused to disregard one of the subsidiaries, even though the applicant had committed itself to the sale of this company's stock. The commission pointed out that no definite time for the sale had been set. It was said that in an application under this section of the law the commission must consider the applicant's position as it appears at the time of the hearing, not as it may appear at some undetermined future date.

In the Potomac Edison Company Case it was further held that an exemption does not turn upon the question whether or not the holding company and its subsidiaries form a single integrated system. *Re Potomac Edison Co. (File No. 31-122, Release No. 1789); Re West Penn Power Co. (File No. 31-129).*

Proof Must Be Presented by Utility Claiming Rate Base above Original Cost

VIEWS of the Federal Power Commission on rate making, particularly on the question of rate base, are contained in the recent decision on wholesale charges of the Interstate Power Company. Rates were based on the original cost of the

property as found by the commission. There was no evidence of record of reproduction cost of the facilities involved. The commission, however, denied a motion to dismiss the proceedings based on the ground that the record was insufficient to permit any order fixing just and reasonable rates.

It was contended by counsel for the power company that the burden of proof was on the commission to show that the rates were not just and reasonable and that the commission representatives had presented no proof of reproduction costs. The commission rejected these contentions with the statement:

> No basis, however, can be found for the contention that such evidence is necessary before the reasonableness of an existing, or of a proposed, rate may be determined by this commission. . . . The original cost of the facilities considered herein is good evidence of their value at the time of construction, and that, if it is necessary to determine the present "fair value" thereof, such cost will continue to measure such value so long as there is no change in the level of applicable prices. McCardle *v.* Indianapolis Water Co. 272 US 400, 410. If present reproduction costs new do not differ from such original costs no advantage would be gained by encumbering the record with evidence with respect thereto. If present reproduction costs are lower than the original costs, the evidence thereof would be of no benefit to the respondent. If it was the contention of counsel for the respondent that present reproduction costs new are higher than the original costs of the facilities involved, and that the use of the latter as the basis upon which rates are to be established herein would result in confiscation, the burden of proof that such would be the result was clearly upon the respondent. Respondent offered no evidence to indicate or suggest that the original cost of the facilities considered herein is not good evidence of their fair value or that there had been a change in the level of applicable prices that would reflect a different rate base. Full opportunity was given respondent to introduce evidence and it refused to do so.

Sale of electricity by the Interstate Power Company to the Albany Lighting Company was held unquestionably to be a sale at wholesale and a sale in interstate commerce. It was said that when the Interstate Power Company put electric energy into the transmission line of the Albany Lighting Company at the point of interconnection of their facilities, there began a continuous transportation from the place of generation in the state of Iowa to the actual consumer in the state of Illinois. The passing of custody or title at intervening points without arresting the movement to the destination did not affect the essential nature of the business.

A rate of return of 6 per cent upon the rate base in the opinion of the commission, would be just, reasonable, and compensatory. *Re Interstate Power Co. et al. (Docket No. IT-5485).*

Interest Rate and Illegal Transaction Preclude FPC Approval of Securities

AUTHORITY for the issuance of stock, including 8 per cent noncumulative dividend preferred shares, was denied by the Federal Power Commission. The commission said it was not denying the opportunity to accomplish, in a proper way, an improvement in the corporate structure, but it objected to the dividend rate.

The proposed financing was for the purpose of providing a somewhat greater assurance of ability to secure funds to meet long-term obligations maturing in 1941. A common stock capital reduction was desired to make possible a credit to capital surplus account, against which an acquisition adjustment account could be written off. The proposed financing was considered objectionable, first, because it would place in the market an 8 per cent preferred dividend share; and, second, because the requested authorization would, in effect, ratify a previous security issue for which no authorization by the commission had been obtained.

Formerly the company had outstanding 7 per cent cumulative dividend preferred shares. It proposed to issue half

as much in aggregate par value amount of 6 per cent cumulative dividend preferred shares and the other half in 8 per cent noncumulative dividend preferred shares. Annual dividend requirements, if earned, would remain the same as formerly, but, if not earned, would accumulate at the rate of only $3 per $100 aggregate amount of par value of preferred shares instead of $7 yearly. The commission said:

> Notwithstanding the fact that the company's position would be either unchanged or bettered, we believe that the issuance of the proposed 8 per cent preferred shares, with the approval of this commission, would be misleading and would tend to create confusion as to the justifiable rate of return on such a security. Under present conditions we are of the belief that authorization of an 8 per cent preferred stock is not compatible with the public interest.

Last year the company, without commission authorization, had purported to effect a substantive change in dividend rights by amending its articles of incorporation and subsequently overprinting a legend stating the changes on outstanding share certificates. The dividend right had, in this way, been changed from a $7 cumulative preferred dividend to a $3 cumulative preferred dividend, plus a $4 noncumulative preferred dividend.

The commission said it was now asked to approve a change in the form of the shares in which a substantive change should be clothed. The commission was of the opinion that the earlier transaction constituted an issue of securities within the meaning of the statute. Moreover, the commission held that it had no power to ratify the transaction. The commission, it was ruled, must approve security issues before their issuance. It was said further:

> But to grant the present application would be to authorize the issuance of new securities in exchange for the illegally issued (and therefore void or voidable) securities purported to have been issued heretofore, thereby in effect indirectly ratifying what we have no power under the Act to directly authorize. This seems to us sufficient in itself to require that the present application be denied.

Re Nevada-California Electric Corp. (*Docket No. IT-5581, Opinion No. 42*).

Federal District Court Not Permitted To Restrain State Action

THE United States Supreme Court held that a Federal district court was barred by § 265 of the Judicial Code from restraining a suit in an Oklahoma court to recover under a supersedeas bond. That the injunction was a restraint of the parties and was not formally directed against the state court itself was said to be immaterial.

This decision was made in a case where rate litigation had been determined adversely to a gas company. During the litigation a supersedeas bond had been posted and a customer sought to recover overcharges under this bond. A Federal district court granted an injunction against the suit for recovery, was sustained by the Circuit Court of Appeals, and reversed by the Supreme Court.

The Supreme Court, however, rejected other grounds on the appeal. It had been contended that the customer, a Delaware corporation, was improperly sued in the Federal district court in Oklahoma. This objection was said to be unavailable since the company had designated an agent for service of process "in any action in the state of Oklahoma." The Federal district court, it was held, was a court of Oklahoma within the scope of that consent.

A claim of *res judicata* based on a prior determination by the supreme court of Oklahoma was disposed of by following the ruling of the state court against the plea of *res judicata*. The Supreme Court declared that on that issue the state law was determinative. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. et al.*

Commission Not Bound by Previous Rulings on Depreciation

OBJECTION was made by utility company representatives, in a municipal acquisition case, that the commission in determining accrued depreciation had not followed earlier rulings. The commission had figured depreciation at a rate of 1½ per cent instead of 1 per cent. The point had been urged that in 1915 in a rate case the commission figured three-fourths of 1 per cent as appropriate for the depreciation expense, and 1 per cent in 1924. The commission said, however:

> In this connection it may as well be pointed out that we do not feel concluded by the use of the rates for depreciation expense used in the 1915 and 1924 cases. The reports of those cases do not indicate that any controversy existed as to the propriety of the rates of depreciation used, but regardless of whether the utility was limited to these rates of depreciation in the computation of expenses or would have been so limited over its objections, we should not be bound in determining an appropriate rate of depreciation, whether for the purpose of determining accrued depreciation or for the purpose of computing current expenses, by what has been assumed to be proper in the past. Depreciation is a matter which can be demonstrated only by experience and as experience accumulates judgment as to what is necessary and adequate as an allowance for current depreciation becomes more accurate. The amount of accrued depreciation which we have considered as having taken place in the property and plant is more supportive of a 1½ per cent allowance than of a 1 per cent allowance.

Re City of Merrill (*2-U-1293*).

Simplification of Corporate Structure Under Holding Company Act

AN application for approval of a proposed plan of corporate simplification pursuant to § 11 of the Holding Company Act was granted by the Securities and Exchange Commission. The commission agreed with the company's statement that its corporate structure was unduly and unnecessarily complicated and that voting power was inequitably distributed among its security holders. The plan of simplification was submitted for the purpose of enabling the company to comply with the requirements of § 11 (b) (2).

Although the company also included in its application a declaration pursuant to Rule U-12E-5 with regard to solicitation material and a declaration pursuant to § 7 with respect to the issuance of securities pursuant to the plan, the commission held that these were unnecessary. It was noted that an application under § 11 (e) is to be regarded as embracing all proceedings included in the plan.

The commission held that common stock should participate in the recapitalization, although there was little, if any, book value back of the common stock. Book value, said the commission, was not conclusive as to the right of the common stock to participation. There was a possibility that common stock might eventually share in earnings, after restrictions on dividend payments pursuant to a loan agreement had expired. The commission said that for reorganization purposes earning power, rather than book value of assets, is the best test of value.

The plan provided no rights for dissenting stockholders other than to receive the securities allocable to them under the plan. It was observed that § 11 makes no express provision for according disparate rights to security holders affected by a plan under that section. It was said to be unnecessary to determine whether a plan might under some circumstances grant such right. In the present case the company's cash position and lack of credit would obviously make a payment to minority stockholders impracticable. Futhermore,

the making of a cash payment might render the plan unfair to other security holders. The commission expressed the opinion that the plan, if consummated in accordance with its terms, would be binding on all security holders affected. *Re Community Power & Light Co. (File No. 54-15, Release No. 1803).*

Company Leasing Trucks Not a Carrier

THE New York commission held that a company leasing its trucks to a company operating a retail store and mail order business was not a common or contract carrier within the meaning of the Public Service Law. Hence, it was not covered by the provisions of the Motor Truck Act, and was not required to obtain operating authority. Commissioner Lunn said:

> Under the facts here presented it does not appear that Motor Leasing, Inc., is actually transporting property for hire. All of the important elements establishing a lease rather than an agreement to transport have been established. The drivers are not employees of the leasing company. The leasing company has no control over the trucks after they are turned over to Montgomery Ward Company. The leasing company would not be responsible for the negligent operation of the trucks. It has no control over where or how the trucks will operate or what routes they shall follow.

Re Motor Leasing, Inc. (Case MT-5096).

Other Important Rulings

THE supreme court of Ohio held that the statute requiring motor transportation companies to file a public liability insurance policy adequately protecting the interests of the public as a prerequisite to the issuance of a certificate by the commission, cannot be extended to include a policy of reinsurance. *Stickel v. Excess Insurance Co. of America, 23 NE(2d) 839.*

The Massachusetts Department of Public Utilities denied petitions for authority to abandon certain passenger stations or to diminish train service substantially, where the evidence was unsatisfactory, because, instead of using actual figures, the company had taken figures for a test week and assumed that the same results would be obtained over a period of a year. *Re Trustees of New York, New Haven & Hartford Railroad Co. et al. (D.P.U. 5548-5552 et al.).*

The Wisconsin commission held that it had no jurisdiction to order the reopening of a former order fixing just compensation to be paid by a municipality for acquisition of utility property, so as to extend the period of time for payment of compensation. *Re Wisconsin Power & Light Co. (U-4032).*

The Colorado commission held that a public utility operating in a sparsely settled area is entitled to a somewhat larger return than a utility serving a more thickly settled and compact area. *Re Colorado Utilities Corp. (Case No. 4664, Decision No. 14528).*

The appellate court of Illinois held that a commission's decision that an electric company had violated no duty to a customer by denying service precluded him from bringing suit in court against the company for alleged wrongful discontinuance of service. *Barry v. Commonwealth Edison Co. 24 NE(2d) 220.*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 31 PUR(NS) NUMBER 4

Points of Special Interest

Titles and Index

TITLES

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ILLINOIS SUPREME COURT

Peoples Gas Light & Coke Company

v.

James M. Slattery et al.

(— Ill —, — NE(2d) —.)

Courts, § 8 — Jurisdiction in equity — Constitutional authority.

1. The circuit courts of the state derive original jurisdiction in all equity cases from § 12 of Art. 6 of the state Constitution, and the legislature cannot validly limit those powers; jurisdiction cannot be taken from the equity courts unless a statutory remedy is substituted which is adequate to prevent irreparable injury, p. 199.

Injunction, § 28 — Against confiscatory rate order.

2. A court of equity has jurisdiction to remedy the wrong in an independent equity proceeding when existing rates become confiscatory and either adequate means under the administrative provisions of the statute or the manner of administering such means is inadequate to prevent confiscation. p. 199.

Appeal and review, § 1 — Adequacy of relief — Order denying temporary rates.

3. An appeal to the circuit court to review the Commission's action in refusing a temporary rate, in a proceeding by a public utility to obtain higher rates, would not grant any relief because the court would not put such temporary rate into effect; the company could obtain no relief from existing rates until the main controversy is determined, p. 199.

Statutes, § 18 — Construction — To uphold validity.

4. A statute must be construed, if possible, in such a manner as to render it constitutional, p. 199.

Injunction, § 13 — Against Commission rate order — Conditions precedent — Rehearing.

5. A complaint in equity to obtain an injunction against the enforcement of an existing rate schedule alleged to be confiscatory is not prematurely filed although the company has not applied to the Commission for rehearing on an order denying the company's request that a schedule of higher rates, suspended by the Commission without notice, be installed as temporary rates, p. 199.

Rates, § 6 — Powers of court.

6. A court cannot make new rates even though it may hold that rates authorized by a Commission are inadequate or illegal or may restrain their enforcement, p. 204.

Appeal and review, § 53 — Grounds for reversal — Commission orders.

7. Orders of the Commission will not be set aside unless arbitrary or unreasonable or in clear violation of a rule of law; and when the sufficiency of an order of the Commission is questioned, it will not be set aside unless it is clearly against the manifest weight of the evidence, p. 204.

Return, § 63 —Confiscation — Burden of Proof.

8. The burden of proof is upon a public utility company contending that a rate schedule is confiscatory to make a convincing showing that confiscation in fact exists, p. 204.

Return, § 64 — Confiscation — Property value — Rate of return.

9. A determination of the question whether the enforcement of rates by a Commission would bring about confiscation must necessarily depend upon the value of the company's property and the net return upon such value that will be realized under the rate allowed, p. 205.

Valuation, § 168 — Original cost determination — Items charged to operation.

10. Inclusion, in original cost of utility property, of items originally charged to operating expenses is error, p. 206.

Valuation, § 21 — Rate base determination — Elements considered.

11. Present value of real estate, reproduction cost new of structures and equipment, original or historical cost, working capital, and intangible elements of value are proper elements to be taken into consideration in the valuation of a utility for rate-making purposes or in confiscation cases, p. 208.

Appeal and review, § 55 — Grounds for reversal — Improper procedure below — Rate determination.

12. The true inquiry upon a review of a rate determination is whether upon the real value of the properties the rate authorized produces confiscation by allowing an inadequate return, regardless of the question whether a lower court arrived at a valuation in an unauthorized manner when reviewing a Commission decision, p. 208.

Valuation, § 410 — Basis for finding — Expert testimony.

13. A Commission has the right to weigh the testimony of all the experts and make its own determination whether the testimony truly brings out the fair value or contains mere conjectures or suppositions as to value, p. 209.

Appeal and review, § 32 — Presumption as to Commission order.

14. An order of the Commission, as a legislative act, is presumed to be valid, and this rule obtains in cases where the court exercises an independent judgment in reviewing the Commission's order, p. 209.

Appeal and review, § 39 — Commission decision — Annual depreciation.

15. The Commission is presumed to be an expert body, and the fixing of the amount allowable for annual depreciation is entirely within its province, which a reviewing court is not at liberty to disturb unless it finds such action arbitrary or unreasonable, p. 212.

Expenses, § 109 — Taxes — Litigated levy.

16. A public utility company should be allowed, as an estimated operating expense, the entire amount of taxes billed against it on property used or useful in the business, without a deduction on the assumption that the utility will litigate its taxes or that it will be successful if it does so, although the company has withheld payment of past taxes which it has litigated, p. 212.

Expenses, § 71 — Arbitrary disallowance — Maintenance.

17. The Commission is without authority arbitrarily to reduce an allowance for maintenance shown to have been actually paid, since amounts of operating expenses capable of definite proof may not be reduced by estimates of what the maintenance should have cost unless there is a further showing that

for some reason the amount was improperly increased over a legitimate cost, p. 213.

Expenses, § 125 — Adjustment of gas burners — Commission authorization.

18. An expenditure by a public utility company in adjusting gas burners of its customers to make them suitable for burning gas containing a higher amount of heat units, an expenditure authorized by the Commission and agreed to have been of an operating character, should not be deducted from income for rate-making purposes although the Commission has ordered that the expenditure be amortized over a period of years out of income, with the right to charge such sum to profit and loss, and has consented to the issuance of securities to enable the company to do the work of conversion promptly, since authorization to borrow the money does not change the character of the operating service and the expenditure is still an operating expense, p. 213.

Expenses, § 93 — Rentals — Company-owned building — Charges to other tenants.

19. A Commission properly reduced the operating expense account of a gas company for excessive rentals of a building owned by the company and excluded from public utility property where the company leased substantially the same kind of space to the general public as it used itself but at a lower rental than charged to utility operation, p. 214.

Expenses, § 79 — Payments to coal company — Contracts approved by Commission.

20. Payments by a gas company to coal companies under contracts authorized and approved by the Commission should not be excluded from operating expense, p. 214.

Expenses, § 46 — Donations.

21. Donations are not a proper operating expense unless it is shown that they will be of some peculiar benefit to the company or its patrons, p. 214.

Expenses, § 4 — Jurisdiction of Commission — Sales promotion — Appliance business.

22. The advisability of promoting sales of gas by a rental-purchase plan for putting stoves or appliances on the premises of customers and the propriety of the amounts thus expended is a matter entirely for the Commission, since gas appliances are sold by others and those sales made by the gas company, if conducted as a separate business, would not be subject to regulation as a utility, p. 215.

Expenses, § 26 — New business promotion — Sales of gas ranges.

23. An expenditure by a gas company under a rental-purchase plan for putting stoves or appliances on the premises of customers should not be allowed in full as a new business expense when a large number of the sales of ranges are replacements of other ranges already used by the customers, as this would not be a promotion of the sale of gas but of the sale of stoves, p. 215.

Return, § 21 — Confiscation and unreasonableness — Distinction.

24. The question whether a certain rate of return constitutes confiscation or, in other words, deprives the company of its property without due process of law is a different question from determining a just and reasonable return upon property used and useful in the utility business, as a reasonable rate is something other or higher than one not strictly confiscatory, p. 217.

Return, § 35 — Fairness — Present conditions.

25. The fair rate of return is to be tested primarily by present-day conditions, p. 217.

Evidence, § 9 — Judicial notice — Economic conditions.

26. The court takes judicial notice of present economic conditions, p. 217.

Return, § 95 — Gas utility — Confiscation.

27. A gas utility company suffers no loss of property that is confiscation by reason of an allowance of only 5 per cent for return, when under present economic conditions the company would have great difficulty in realizing 5 per cent upon the money it has invested in its utility enterprise if invested in securities which would be as sound and as certain to return a like percentage, p. 217.

(JONES, J., dissents.)

[December 12, 1939.]

APPEAL *from decree of Circuit Court enjoining Commission from enforcing certain gas rates on the ground of confiscation; reversed and remanded with directions. For Commission decision, see 19 PUR(N.S.) 177.*

APPEARANCES: John E. Cassidy, Attorney General (Montgomery S. Winning, Harry R. Booth, W. Robert Ming, Jr., Thomas A. Keegan, John P. Barnes, Jr., Frederick Zazove, William F. Schulz, Jr., Assistants Attorney General, of Counsel), for appellant; Barnet Hodes, Corporation Counsel, for the city of Chicago; Cooke, Sullivan & Ricks, Wilson & McIlvaine (George A. Cooke, Francis L. Daily, Edward H. Fiedler, John M. Connery, James T. Mullaney, Joseph R. Gray, of Counsel), for appellee.

Mr. Justice GUNN delivered the opinion of the court: This is a direct appeal from a decree of the circuit court of Cook county, entered on the complaint of the Peoples Gas Light and Coke Company, appellee, enjoining appellants, members of the Illinois Commerce Commission, and Otto Kerner, attorney general, from enforcing against appellee certain rates for gas in the city of Chicago, on the ground that such rates deprive appellee of its property without due process of law, in violation of the state and Federal Constitutions. In its complaint the appellee, hereafter referred to as the company, alleged that after the imposition of an additional 3 per cent tax upon its gross receipts in 1935, the existing rate schedule (No. 17) had become confiscatory and that the Illinois Commerce Commission, hereafter referred to as the Commission, had repeatedly refused to permit any increase. The case involves the validity of a statute and the construction of the state and Federal Constitutions.

The rates involved are those contained in the company's schedule ICC No. 17, which became effective April 15, 1934. On July 1, 1935, the company became subject to the 3 per cent public utility tax upon its gross receipts, amounting to about $800,000 per year. On July 16, 1935, the com-

pany filed with the Commission a new schedule of rates (No. 18) proposing a flat increase of 3 per cent to cover the amount of that tax. On August 7, 1935, the Commission entered an order suspending schedule No. 18. After hearing evidence, the Commission, on June 12, 1936, entered a final order permanently suspending schedule No. 18. On June 26, 1936, the company filed with the Commission schedule No. 19, proposing an increase in rates from 58 cents to 90 cents per month for the first 2 therms of gas used, and also an increase from 60 cents to 90 cents in the minimum monthly bill. This would have increased the company's revenue about $3,000,000 per year. The Commission entered an order on July 1, 1936, suspending schedule No. 19 until November 24, 1936, and set the case for hearing for July 15th. On that date, the Commission received all the evidence that had been introduced in the case involving schedule No. 18, and the company introduced certain additional testimony and rested its case. On July 24, 1936, the company petitioned the Commission to install the rates in schedule No. 19 as temporary rates until the entry by it of a final order. The Commission entered an order on August 21, 1936, denying this petition. On September 1, 1936, the company filed its complaint in equity in the circuit court of Cook county, against the members of the Commission and the attorney general, reciting all the proceedings before the Commission, and alleging that the rates in schedule No. 17 were so low as to deprive the company of its property without due process of law, and sought relief by temporary and permanent injunction to restrain the defendants from enforcing such rates against the company. It was alleged that the present value of the company's property was $156,000,000, and that it was entitled to a return thereon of 7 per cent, and that by reason of the Commission's suspension of the increased rates in schedule No. 19 the company was being continuously deprived of a fair return upon the value of its property by more than $3,000,000 a year, which loss was irretrievable, and that there was no adequate remedy to protect it against such loss except in a court of equity. The complaint further alleged that § 68 of the Public Utilities Act, in so far as it purported to prohibit the exercise of equity jurisdiction in such a case, was invalid as a direct violation of § 12 of Art. 6 of the Illinois Constitution, which vests the circuit courts with original jurisdiction in equity, and also contained other allegations pertinent to the character of the case.

The defendants filed their answer to the complaint September 10, 1936, denying the inadequacy of the existing rates, alleged that the circuit court lacked jurisdiction, and that the suit was brought prematurely. The answer also alleged that the value of the company's property did not exceed $120,000,000, and that a fair and just rate of return would not exceed 6 per cent, and that the company, for the year 1936, would earn more than that, and that the existing rates were fair and reasonable.

The company applied to the circuit court for a temporary injunction supported by affidavit, and counter-affidavits were filed by the Commission. On October 23, 1936, the court grant-

ed a temporary injunction restraining the defendants, pending final hearing, from enforcing the rates in schedule No. 17, upon condition that the company would not charge rates in excess of those in schedule No. 19, and required the company to impound monthly, in a bank, as a special fund subject to the order of the court, the difference between the existing rates and schedule No. 19, and provided for refunds of the impounded money to the consumers in the event the company should fail to establish the rates in schedule No. 17 were confiscatory. On appeal, the appellate court for the first district entered an order staying the effect of the temporary injunction, and, on December 8, 1936, entered a judgment vacating the injunction. Peoples Gas Light & Coke Co. v. Slattery (1936) 287 Ill App 379, 16 PUR (NS) 381, 5 NE(2d) 285. To review that judgment the company, on December 11th, sued out of this court a writ of error and applied for a supersedeas, and the Commission moved to dismiss the writ for want of jurisdiction. On February 16, 1937, this court denied a supersedeas but took the case under advisement, together with the motion to dismiss. Meanwhile the Commission further suspended schedule No. 19 until May 24, 1937.

On January 20, 1937, the circuit court referred the cause to a master for hearing. The Commission also conducted its hearing as to schedule No. 19. On March 4, 1937, the parties stipulated that the evidence introduced and to be introduced before the Commission should be promptly introduced before the master in chancery, and this was done. The Commission entered its final order May 21, 1937 (19 PUR (NS) 177) holding that the existing rates were reasonable, and permanently canceled schedule No. 19. On May 25, 1937, the company filed in the circuit court its amended and supplemental complaint, reciting all occurrences subsequent to the filing of the original complaint, again alleging the existing rates were confiscatory and prayed for additional relief against the enforcement of the final order of the Commission on schedule No. 19. The company did not appeal from the ruling of the Commission on schedule No. 19. Answers were filed and additional evidence taken, and on September 10, 1937, the master submitted his report to the parties and after passing upon appellants' objections filed it with the court. On October 4, 1937, the company filed its motion in this court to dismiss its writ of error, on the ground the case had become moot and it was accordingly dismissed. After hearing arguments on exceptions to the master's report, the circuit court, on January 26, 1938, filed its opinion finding the issues in favor of the company. On January 31, 1938, the Commission moved the court to rerefer the cause to the master for the introduction of additional evidence, but this motion was overruled. On February 4, 1938, the chancellor entered a final decree, finding the circuit court had jurisdiction of the parties and of the subject matter, and that schedule No. 17, and rates contained therein, were confiscatory and in violation of both state and Federal Constitutions, and that § 68 of the Public Utilities Act, in so far as it purported to deny jurisdiction of courts of equity, was unconstitutional and void, and that the company had no adequate remedy ex-

cept by proceeding in equity and would suffer irreparable injury unless an injunction should issue restraining the enforcement of the rates set out in schedule No. 17. The final decree restrained the Commission from enforcing schedule No. 17 against the company and enjoined the final order of the Commission upon schedule No. 19 and the provisions of the Public Utilities Act, to the effect that the company be required to adhere to those rates found reasonable in that hearing. The final decree also required the company, pending final disposition of the cause on appeal, to deposit monthly, as a special fund, the difference between the rates set forth in schedule No. 17 and any money collected by the company in excess of those rates, in like manner as provided in the temporary restraining order.

[1–5] The points chiefly relied upon for reversal are that this suit was prematurely brought; that the circuit court lacked jurisdiction of the subject matter; that the court erred in holding § 68 of the Public Utilities Act unconstitutional, and that the circuit court erred in the valuation of the company's property, the return it was entitled to, the amount it was actually earning, and what constituted a confiscatory rate as distinguished from a fair and just rate.

Appellants claim that the company should have applied to the Commission for a rehearing of the order of August 21, 1936, denying the company's petition to install schedule No. 19 as a temporary rate and if a rehearing had been denied, or if upon a rehearing relief was denied, that an appeal should have been taken to the circuit court under provisions of the Public Utilities Act, and that the remedies provided by law were adequate and exclusive and a court of equity, therefore, has no jurisdiction to grant any kind of relief during the period within which the Commission is authorized, under the statute, to consider an application for increase in rates, and that the company should also have applied to the Commission for a rehearing of its final order of May 21, 1937 (19 PUR(NS) 177) permanently canceling schedule No. 19, and have taken an appeal from such action under the statute.

It is necessary to briefly examine the pertinent and applicable provisions of the Public Utilities Act. There are three sections of the act which have particular application to all proceedings with reference to the changing of rates and appeals from the Commission and proceedings in court, namely §§ 36, 67, 68. (Ill. Rev. Stat. 1937, Chap. 111⅔, pars. 36, 71, 72.) Paragraph 36 (§ 36) applies to the filing of a new rate by a utility. This may be done by filing a new schedule which operates as a petition to install such rates and cannot go into effect for thirty days. If it is in effect thirty days, it becomes a legal rate. The Commission has power to suspend this schedule at once without a hearing, first for a period of one hundred and twenty days, and for an additional six months if necessary. By this paragraph the Commission has authority, also, to suspend a rate legally in force upon a *hearing* and may temporarily suspend such rate, but if it does so, and it is afterwards found a proper one, the company must be reimbursed for its losses by an increased rate until the losses are made up.

Paragraph 71 (§ 67) relates to procedure before the Commission and, among other things, provides that after *notice and hearing,* it may rescind or amend any rule, regulation, or order made by it, and that within thirty days after the service of such rule, regulation, order, or decision, the utility may apply for a rehearing which must be acted upon within twenty days, and no appeal shall be allowed unless and until an application for a rehearing is made.

Paragraph 72 (§ 68) provides for an appeal within thirty days, from two kinds of orders: First, from those orders which the Commission has made on a hearing, and second, from those orders which the Commission is authorized to make *without a hearing.* In the first kind of an order, application for rehearing is absolutely necessary. For the second kind of an order, the statutory language is: "No proceeding to contest any rule, regulation, decision, or order which the Commission is authorized to *issue without a hearing* and has so issued, shall be brought in any court unless application shall have been first made to the Commission for a hearing thereon and until after such application has been acted upon by the Commission," etc. Applying the provisions of the statute to the present case we find that filing schedule No. 19 operated as a petition for an increase in rates and became effective within thirty days unless suspended. The Commission had authority to suspend it without notice, which it did. Under par. 72 this order of the Commission could not be questioned unless the company asked for a hearing thereon. The company did ask that the rate which the Commission had suspended be installed as a temporary rate. This petition the Commission denied. No further action was necessary, as the statute does not require an application for a rehearing upon a matter which the Commission is authorized to order or direct without a hearing. In such cases all that is required is to request a hearing and get a decision. This was done. It is true that the pleadings do not follow the precise course outlined by the statute, but it is clear that the company petitioned that the scheduled rates, which had been suspended without notice, be installed as temporary rates, and this was refused by the Commission.

What we have just pointed out indicates that the legislative action of the Commission on the question of a temporary rate had been terminated. So far as the company getting relief from alleged confiscation pending a hearing of the merits of schedule No. 19, there was no further action that could be taken by the Commission. It had decided the question of temporary rates and an appeal from this order to the circuit court would be heard upon the record and nothing done other than to affirm or remand to the Commission, the circuit court being without authority to fix rates, temporary or otherwise. Chicago, B. & Q. R. Co. v. Commerce Commission (1931) 345 Ill 576, 178 NE 157; Illinois Commerce Commission ex rel. Lumaghi Coal Co. v. Chicago & E. I. R. Co. (1928) 332 Ill 243, PUR1929C, 679, 163 NE 664.

The statute did provide a method in which the utility could be adequately protected. The Commission could have allowed schedule No. 19 to be-

come effective by remaining in force thirty days and then have suspended it, in which case the statute affords relief at the end of an investigation. It was also within the power of the Commission to allow temporary rates which the Commission could control by special deposits, and by requiring a refund if an investigation proved they were not justified. If neither of these courses were authorized by the Commission and confiscation took place, the question arises whether these means of preventing confiscation are exclusive and prevent any application to a court except by appeal as provided by statute, or whether, in a proper case, equity may interpose where the law does not adequately protect the utility or where the manner of administering a law brings about the injury. Jurisdiction cannot be taken away from the equity courts unless a statutory remedy is substituted which is adequate to prevent irreparable injury. Prior to the passage of the Public Utilities Act, courts of equity had jurisdiction and power to enjoin enforcement of confiscatory rates. Chicago v. Rogers Park Water Co. (1905) 214 Ill 212, 73 NE 375. The circuit courts of this state derive original jurisdiction in all equity cases from § 12 of Art. 6 of the Constitution, and the legislature cannot validly limit those powers. Stephens v. Chicago, B. & Q. R. Co. (1922) 303 Ill 49, 135 NE 68; Howell v. Moores (1889) 127 Ill 67, 19 NE 863; Myers v. People (1873) 67 Ill 503; Frackelton v. Masters (1911) 249 Ill 30, 94 NE 124. The power of issuing injunctions to prevent irreparable injury has long been an undoubted right of equity courts, of which they cannot be deprived, under the Constitution, except in cases where a substitute remedy is provided that gives the same measure of relief.

In support of the contention that the statutory remedy by appeal under the Public Utilities Act is adequate, and excludes the jurisdiction of the equity courts, the Commission refers to Hoyne v. Chicago & O. P. Elev. R. Co. (1920) 294 Ill 413, PUR1921A, 328, 128 NE 587; Chicago v. O'Connell, 278 Ill 591, PUR1917E, 730, 116 NE 210, 8 ALR 916; Chicago, N. S. & M. R. Co. v. Chicago (1928) 331 Ill 360, 163 NE 141; State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. (1919) 291 Ill 209, PUR 1920C, 640, 125 NE 891; and Illinois Bell Teleph. Co. v. Commerce Commission (1922) 306 Ill 109, 137 NE 449. In the Hoyne Case, *supra,* the state's attorney filed an information in chancery, asking for an injunction to restrain the utility from putting in effect a rate fixed by the Commission, as being an infringement of a contract ordinance. In Chicago v. O'Connell, *supra,* a bill for injunction was brought by the city to restrain the Commerce Commission from enforcing certain orders with respect to the methods of operating the city railroads in which the city was interested. In Chicago, N. S. & M. R. Co. v. Chicago, *supra,* the railroad filed a bill for injunction to enjoin the city interfering with appellant's use of the elevated railroad tracks, a right claimed by the city under the original franchise. The decree of the lower court, upholding the city, was reversed in the supreme court. In State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co.

supra, the proceeding started before the Commission and by appeal came to the supreme court. In Illinois Bell Teleph. Co. v. Commerce Commission, *supra,* a bill for injunction was filed to enjoin the Commission from bringing any suit or proceeding to enforce a certain schedule of rates. An application for new rates had been made and, after considerable delay, the proposed new rates were promptly suspended without the Commission entering any order as to whether the new rates would be just and reasonable or what would be just and reasonable rates. The court, in that case, held the remedy was by *mandamus* rather than by injunction. This brief analysis discloses that none of these cases holds that under the Public Utilities Act the remedy by appeal is exclusive, and in four of these cases, where the proceeding was started by a bill in chancery, no question was raised as to the right of a court of equity to hear the case.

There is a distinction between the method of determining what a just and reasonable rate may be and the manner of reviewing it, from a question of determining whether a rate already in force and not in any manner under review, is confiscatory. In the first instance, administrative process is constitutionally sufficient to determine that question, and a provision for review by courts adequately protects the rights of the utility, but when the legislative process of rate making is ended and the rate in force becomes confiscatory—that is, results in the taking of property without process of law —and either adequate means under the administrative provisions or the manner of administering such means is inadequate to prevent confiscation, then a court of equity has jurisdiction to remedy the wrong in an independent equity proceeding.

The action of the Commission which immediately preceded the filing of the equity suit in this case was its denial to install a temporary rate. Its order in this respect ended its legislative function so far as temporary rates were concerned. Without temporary rates the company would have to operate many months without an adequate return and with no possibility of getting any compensation if it were eventually successful. An appeal to the circuit court to review the Commission's action in refusing a temporary rate would not grant any relief because the courts would not have put such temporary rates into effect. People's Gaslight & Coke Co. v. Chicago (1923) 309 Ill 40, PUR 1924A, 291, 139 NE 867; Alton & S. R. Co. v. Commerce Commission ex rel. Perry Coal Co. 316 Ill 625, PUR1925D, 251, 147 NE 417; Commerce Commission ex rel. Lumaghi Coal Co. v. Chicago & E. I. R. Co. *supra.* Neither pending such an appeal, nor as a result of a reversal of the Commission's order, could the company have obtained any relief from existing rates until the main controversy was determined.

The company had petitioned, by schedule No. 18, to have its rates increased to the extent of $800,000 a year and this had been denied. After this was done, schedule No. 19 sought an increase of approximately $3,000,000 a year, and the temporary rate sought would have put it into effect. When this was denied, it is not reasonable to suppose that any action on

appeal to the circuit court would bring any relief pending hearing of the main cause, either from disinclination of the Commission to act, or from the time it would necessarily take to prepare a record and get the cause heard in the circuit court. In comparable cases it has been held that at this stage of the proceeding the company is justified in seeking relief in a court of equity. Prendergast v. New York Teleph. Co. 262 US 43, 67 L ed 853, PUR1923C, 719, 43 S Ct 466; Smith v. Illinois Bell Teleph. Co. 270 US 587, 70 L ed 747, PUR1926C, 754, 758, 46 S Ct 408. The last case arose in Illinois after the passage of our present Public Utility Act. The facts show that the telephone company was operating at a loss. A schedule of rates had been filed which later became effective. Before the order on such rate was made, a second schedule was filed for increased rates. This was suspended by the Commission from May, 1920, until October, 1921, when it was permanently suspended. An appeal was taken to the circuit court, and the Commission's order remanded for further proceedings. The Commission redocketed the case and continued hearings until September, 1922, when the company filed a written motion requesting the Commission to make effective a temporary schedule of rates pending final determination, and this was denied almost immediately. In July, 1923, attention was called to the delay and a request made that the Commission set an early hearing, which was ignored, and, finally, a suit in equity was brought in June, 1924, in the United States court. In that case the Commission sought to have the injunction set aside because the company, prior to filing its bill, had not exhausted its legislative remedies. The court, in overruling this contention said: "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a Federal court for equitable relief. The facts which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in Oklahoma Nat. Gas Co. v. Russell, 261 US 290, 293, 67 L ed 659, PUR1923C, 701, 43 S Ct 353; Prendergast v. New York Teleph. Co. *supra*; Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 US 196, 68 L ed 975, PUR 1924D, 781, 44 S Ct 553; and Banton v. Belt Line R. Corp. (1925) 268 US 413, 69 L ed 1020, PUR1926A, 317, 45 S Ct 534." The question of confiscation is a judicial one (Edwardsville v. Illinois Bell Teleph. Co. (1923) 310 Ill 618, PUR1924C, 121, 142 NE 197; Mt. Carmel Public Utility & Service Co. v. Public Utilities Commission, 297 Ill 303, PUR1921D, 108, 130 NE 693, 21 ALR 571) and courts of equity of the state of Illinois, under the Constitution, have no less power than the courts of equity of the United States in determining this question. The Smith Case, *supra*, involving as it does the Public Utilities Act of Illinois and the refusal to install a temporary rate, with practically the same question raised on the point of jurisdiction, is controlling of the situation.

It is true that the delay was not as long continued in the present case as in the Smith Case, *supra,* but the principle underlying the cases is the same, and it is our conclusion that the circuit court had jurisdiction of the cause.

It is claimed that § 68 of the Public Utilities Act prevents the relief prayed in this case. The latter part of this section provides that when no appeal is taken from an order of the Commission the parties affected thereby shall be deemed to have waived the right to have the merits of the controversy reviewed by a court, and there shall be no trial of the merits of any controversy in which the order was made by any court to which application may be made for a writ to enforce the same or in any other judicial proceeding. This provision must be construed to apply to the procedure of reviewing the acts of the Commission by the statutory appeal provided, as otherwise it would absolutely bar any relief in courts of equity and thus oust them from their constitutional powers in cases where the statute does not provide for adequate relief, and likewise, would be a denial of the right of judicial review in cases where the acts or omission of the Commission violate constitutional guaranties. Ex parte Young (1908) 209 US 123, 52 L ed 714, 28 S Ct 441; Missouri P. R. Co. v. Tucker (1913) 230 US 340, 57 L ed 1507, 33 S Ct 961; Ohio Valley Water Co. v. Ben Avon, 253 US 287, 64 L ed 908, PUR1920E, 814, 40 S Ct 527. We must presume the legislature did not intend this part of § 68 to apply to cases arising outside of the scope of the Public Utilities Act. We will construe a law, if possible, in such a manner as to render it constitutional. Punke v. Elliott (1936) 364 Ill 604, 5 NE(2d) 389; Illinois Bell Teleph. Co. v. Ames (1936) 364 Ill 362, 4 NE(2d) 494; Boshuizen v. Thompson & Taylor Co. (1935) 360 Ill 160, 195 NE 625. The legislative process of fixing schedule No. 17 having been completed, and the rate having been in force for more than two years, the company was entitled to make an application for higher rates to be installed temporarily while the merits of the main application were being heard. Holding, as we have, that the legislative process upon the question of the installation of the temporary rate was completed as far as the Commission was concerned, we are of the opinion that the original complaint was not prematurely filed.

This brings us to a consideration of the merits of the case. The record is large. The abstract, final order of the Commission, master's report, and the opinion of the chancellor contain several hundred pages and, in addition, the briefs are exceedingly voluminous. To recite, in detail, all of the evidence bearing upon the ultimate issues and resolve all the conflicting contentions of law, would unduly prolong this opinion, and we shall, therefore, content ourselves with a discussion of the controlling issues without going into all the minute details of evidence or refinements of legal positions.

[6–8] The hearings conducted by the Commission on schedule No. 19, and those by the court to permanently enjoin the enforcement of schedule No. 17, proceeded concurrently and resulted in a finding by the Commission that the proposed rate No. 19 was

excessive and the old rate adequate, and, on the other hand, a decree and finding by the court that schedule No. 17 was confiscatory and that the proposed schedule No. 19 would produce a return of little more than 4 per cent upon the value of the company's property. Notwithstanding these two proceedings were conducted concurrently, the true issue presented and to be determined by this court is whether the rates provided by schedule No. 17 are confiscatory, even though the Commission, in rejecting schedule No. 19, was required to find what would be a reasonable rate. Illinois Bell Teleph. Co. v. Commerce Commission (1922) 306 Ill 109, 137 NE 449.

The legislature has vested in the Commerce Commission the exclusive functions of fixing rates of public utilities which will be just and reasonable and produce a fair return upon the property used and employed in the public service. Even though a court may hold that the rates authorized by a Commission are inadequate or illegal and restrains their enforcement, it cannot make new rates. South Chicago Coal & Dock Co. v. Commerce Commission (1936) 365 Ill 218, 19 PUR(NS) 86, 6 NE(2d) 152. Only the Commerce Commission has this power. Commerce Commission ex rel. Lumaghi Coal Co. v. Chicago & E. I. R. Co. (1928) 332 Ill 243, PUR 1929C, 679, 163 NE 664; People's Gaslight & Coke Co. v. Chicago (1923) 309 Ill 40, PUR1924A, 291, 139 NE 867. Orders of the Commission are entitled to great weight, and a court will not set one aside unless it is arbitrary or unreasonable or in clear violation of a rule of law. (South Chicago Coal & Dock Co. v. Commerce Commission, *supra*), and when the sufficiency of an order of the Commission is questioned it will not be set aside unless it is clearly against the manifest weight of the evidence. Commerce Commission ex rel. Lumaghi Coal Co. v. Chicago & E. I. R. Co. *supra;* South Chicago Coal & Dock Co. v. Commerce Commission, *supra.* The basis of the company's contention in court is that schedule No. 17 is confiscatory, and where this is the issue the burden is upon the company to make a convincing showing that confiscation, in fact, exists. Lindheimer v. Illinois Bell Teleph. Co. (1934) 292 US 151, 169, 78 L ed 1182, 3 PUR(NS) 337, 54 S Ct 658; Dayton Power & Light Co. v. Ohio Pub. Utilities Commission (1934) 292 US 290, 299, 78 L ed 1267, 3 PUR(NS) 279, 54 S Ct 647; Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 77 L ed 1180, PUR1933C, 229, 53 S Ct 637; American Toll Bridge Co. v. California R. Commission (1939) 307 US 486, 83 L ed 1414, 29 PUR (NS) 65, 59 S Ct 948.

[9] There can be no argument but that the enforcement of rates by the Commerce Commission which would bring about confiscation would be violative of law. A determination of this question must necessarily depend upon the value of the company's property and the net return upon such value that will be realized under the rate allowed. Both value and earnings must be ascertained in the light of certain well-established rules to be observed by both courts and Commissions. It is around this feature of the case the principal controversy arises, as there is a decided difference of

opinion between the company and the Commission, not only as to how the value of the public utility is to be determined for rate-making purposes, but also the proper elements to be taken into consideration to ascertain the net return that will be produced by the authorized rate. One of the principal questions is the fair value of the property of appellee, used or useful in the distribution of gas. Each of the parties, in fixing the fair value, considered land separate from the structures on the land. The company offered evidence of the reproduction cost new of the structures, as of the date of the hearing, and also offered the original or historical cost of the structures, trended to present prices,—i. e., all the material parts and labor progressively used in developing the plant were itemized separately and taken at present costs, and thus produced what they call original cost trended to present prices.

Both of the parties offered evidence of the present value of the lands owned by appellee. Without going into the details of each separate tract, the value of the lands, without the structures, was given by the respective witnesses as follows: Commission's witnesses, $6,496,902; company's witnesses, $11,737,175. The Commission's witnesses found that of this property the real estate included property of the value of $2,291,296, non-useful in the utility enterprise, leaving a net value of the land of $4,205,606. From the testimony offered on both sides on the value of lands, the Commission found that the value of lands used or useful was $4,732,822, and the value of lands not used or useful was $1,727,917. On the other hand, the master and chancellor, from the same testimony, found the value of all the lands to be $9,180,259.50, and the value of the land not used or useful to be $1,466,976.90, leaving a net valuation of lands used and useful of $7,713,282.60. There is no dispute about the original cost of all the land, both used and useful, being $4,556,121.

It is impossible to reconcile the testimony of the respective witnesses upon the value of lands. The lands comprise some thirty-three tracts, ranging in value from a few hundred dollars to one tract of three million dollars. In some instances, the appraisers agree upon the value, and in others the differences range from a small per cent to over 50 per cent. On total results, it will be seen that the valuation fixed by the Commission's witnesses was about two-thirds that of the company's witnesses. The Commission's valuation was less than half of that fixed by the company, and the master's valuation about 75 per cent of that of the company. The master and the Commission both found the valuation of the land by the company's witnesses to be excessive. Both found there was a considerable amount of the real estate not used or useful. There is nothing definite and certain about the value of these several tracts of real estate, other than the original cost. In the very nature of things it is more or less a speculation depending upon which expert is believed. We cannot say the value fixed by the Commission was shown to be unreasonably low.

Original Cost

[10] The original cost new, as

shown by the company, of the other physical property, is $111,330,067.67. There is no opposing proof upon this question. However, included in this amount is the sum of $1,957,753, of items which were charged to operating expenses. Most of the items were part of general expenses originally charged to operation and now allocated to construction. The inclusion of this item in cost of property in our opinion, was error.

The original cost of property for rate-making purposes may not be increased because of a change in the company's policy with respect to charge items as between operation and construction. Knoxville v. Knoxville Water Co. (1909) 212 US 1, 53 L ed 371, 29 S Ct 148. In Lindheimer v. Illinois Bell Teleph. Co. *supra*, where amounts charged to operating expenses and charged to depreciation reserve were too high, the company was not permitted to show, in fact, that part of such expenses went into the capital structure, the court, at p. 348 of 3 PUR(NS), saying: ". . . if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return." In Wheeling v. Natural Gas Co. (1934) 115 W Va 149, 5 PUR (NS) 471, 175 SE 339, it is held that where overhead items of physical property were charged to operating expenses, they could not be changed into the capital account for rate-making purposes, because, while such expenses were being so charged, the rates were undoubtedly fixed and based upon their being a part of regular expenses. It seems clear that it is not proper to build up operating expenses and get the advantage of a rate authorized to cover them, and later change the method of accounting to include such excess items as a part of the investment of the company, when, in reality, the money has been furnished by the customers of the company. The original cost, to this extent, was excessive and we find that the Commission's original cost valuation of $109,750,000 is justified by the evidence.

Reproduction Value New

The company witnesses testify the total value of the property of use and useful new to be $165,682,411, which is made up of the following: Physical property, $140,348,326; going value, $15,000,000; working capital, $10,334,085. The method by which these various amounts were so arrived at is substantially as follows: The real estate values were taken as above stated. The reproduction cost new of the physical property, exclusive of real estate, was fixed by the company's witnesses at the sum of $156,709,359, which included the sum of $2,746,024 applicable to land, only, which was depreciated approximately 17 per cent, and to which was added the above amount for going value and working capital. The Commission's reproduction cost new was fixed by its witnesses at $122,992,633, which was depreciated approximately 27½ per cent, to which nothing was added for going value or

working capital. The Commission, in its order (19 PUR(NS) 177) found the reproduction cost new of the physical property to be $127,869,677, the depreciation 22½ per cent, and the value of the useful real estate $4,732,822. It then allowed $7,500,000 for working capital and added to the result thus obtained $7,200,000 for intangibles, making a valuation of $120,000,000. The master found the reproduction cost new of the physical property to be $150,467,084, the depreciation upon this amount 15 per cent, to which he added $8,250,000 for working capital and $7,200,000 for going value, and arrived at a valuation, for rate purposes, of $147,497,418.

The discrepancies in everything except the original cost are so startling as to require an examination into the methods used to arrive at the different results.

[11, 12] The valuation of the property of the company was ascertained by the Commission considering the present value of the real estate, the reproduction cost new of the structures and equipment, the original or historical cost, and included in the valuation was the sum of $7,500,000 for working capital and the sum of $7,200,000 for any intangible or other elements of value which may not have otherwise been provided for, which would, of course, include going value. The elements considered by the Commission were proper elements to be taken into consideration in the valuation of the utility for rate-making purposes or in confiscation cases. Smyth v. Ames (1898) 169 US 466, 42 L ed 819, 18 S Ct 418; Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 77 L ed 1180, PUR1933C, 229, 53 S Ct 637; Driscoll v. Edison Light & P. Co. (1939) 307 US 104, 83 L ed 1134, 28 PUR(NS) 65, 59 S Ct 715; State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. (1919) 291 Ill 209, PUR1920C, 640, 650, 125 NE 891. On the other hand, the master, in arriving at the valuation of the property other than real estate, considered only reproduction cost new. It is claimed that the testimony of the witness who took the original cost and trended it to present prices, constituted a consideration of original or historical cost, but this is negatived by the fact that there is approximately only $300,000 difference in value fixed in this manner and by a straight reproduction estimate, and by the further fact that this witness, in submitting his appraisal, refers to it as being an appraisal of the reproduction cost of the used and useful property of the company. The supreme court of this state in State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. *supra,* rejected this method of valuing a public utility for rate-making purposes. It was there said: "Appellee contends that the only equitable basis for determining value for rate-making purposes is the cost of reproduction new, less depreciation. This contention cannot be sustained. The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a public utility under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value the original cost of construction, the amount expended in permanent im-

provements, the present cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case." This proposition is supported by the great weight of authority. Georgia R. & Power Co. v. Railroad Commission, 262 US 625, 67 L ed 1144, PUR1923D, 1, 43 S Ct 680; Los Angeles Gas & E. Corp. v. California R. Commission, *supra;* West v. Chesapeake & P. Teleph. Co. (1935) 295 US 662, 79 L ed 1640, 8 PUR(NS) 433, 55 S Ct 894; California R. Commission v. Pacific Gas & E. Co. (1938) 302 US 388, 82 L ed 319, 327, 21 PUR(NS) 480, 58 S Ct 334. The method of valuation adopted by the court and master was not only erroneous from a standpoint of fixing just and reasonable rates but also upon the issue of confiscation. The fact, however, that the master and circuit court arrived at a valuation in an unauthorized manner is not controlling because the court cannot, in any event, fix the rates that a utility may charge, and is only referred to as showing the great discrepancy between the value fixed by the court and that fixed by the Commission. The true inquiry in this case is whether upon the real value of the properties of appellee, the rate the Commission authorized the company to charge produces confiscation of appellee's property by allowing it an inadequate return. The fact that the master and court did not consider proper elements in arriving at a true value does not necessarily mean that the valuation fixed by the Commission is correct, and if found to be correct the rate allowed may still bring about confiscation by producing less than a fair return upon the valuation fixed. Our inquiry will, therefore, be directed to the proposition of the value of the company's property as fixed and found by the Commission.

[13, 14] The Commission offered evidence of its own experts of the reproduction cost new of the property. It considered the testimony of the experts of the plaintiff. It took into consideration original cost, the percentage of depreciation in the existing property, the property useful or nonuseful, and in an exhaustive analysis considered all of the elements offered in evidence from both sources tending to establish fair value at the time of the hearing. Its finding was not based entirely upon original cost or entirely upon reproduction new but was a combination of all, as required by the rules above set out. The Commission had the right to weigh the testimony of all the experts and make its own determination whether the testimony truly brought out the fair value or contained mere conjectures or suppositions as to the value. South Chicago Coal & Dock Co. v. Commerce Commission (1936) 365 Ill 218, 19 PUR(NS) 86, 6 NE(2d) 152; Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission (1934) 292 US 398, 78 L ed 1327, 4 PUR(NS) 152, 54 S Ct 763, 91 ALR 1403; California R. Commission v. Pacific Gas & E. Co. *supra.* The order of the Commission as a legislative act is presumed to be valid (Cotting v. Kansas City Stock Yards Co. (1901) 183 US 79, 46 L ed 92, 22 S Ct 30; Darnell v.

Edwards, 244 US 564, 61 L ed 1317, PUR1917F, 64, 37 S Ct 701), and this rule obtains in cases where the court exercises an independent judgment in reviewing the Commission's order. St. Joseph's Stock Yards Co. v. United States (1936) 298 US 38, 80 L ed 1033, 14 PUR(NS) 397, 56 S Ct 720. As above pointed out, the burden is upon the company to show that the acts of the Commission bring about confiscation, because the purpose of the suit is to arrest the operation of a law on the ground it is void (Knoxville v. Knoxville Water Co. (1909) 212 US 1, 53 L ed 371, 29 S Ct 148) and one of the acts charged is that the order improperly fixed the fair value of the plaintiff's property too low. Recent cases have held that if the Commission has given little, if any, weight to testimony as to the reproduction cost new of the utility as being hypothetical and conjectural, it is not a denial of due process of law. California R. Commission v. Pacific Gas & E. Co. *supra;* Dayton Power & Light Co. v. Ohio Pub. Utilities Commission (1934) 292 US 290, 78 L ed 1267, 3 PUR(NS) 279, 54 S Ct 647. The original cost was practically an agreed figure, but the testimony of the experts as to reproduction cost new differed to the extent of approximately $30,000,000. We think it is impossible, from a reading of the testimony, to show that any more weight can be given to the testimony of one set of experts over the other. The Commerce Commission was created for the express purpose of handling cases of this character and its judgment of the value of the testimony is entitled to great weight. The order of the Commission allowed the plaintiff $7,500,000 working capital, which does not appear to be inadequate, and there was a further allowance of $7,200,000 to cover other intangible elements. This can properly be used to cover going value or any other intangible elements, under whatever name they may be designated. Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission, *supra.* The record is replete with testimony of percentages of depreciation, obsolescence, replacement, and maintenance, which it was the province of the Commission to consider and analyze. In its report, which appears in the evidence, this seems to have been done with great ease.

From the record, we are unable to say that the plaintiff has established, by clear and convincing testimony, that the Commission proceeded in an arbitrary or illegal manner in fixing the fair value of all the plaintiff's property used or useful in its utility enterprise at $120,000,000.

In Georgia R. & Power Co. v. Railroad Commission, *supra,* the company claimed a valuation of $9,500,000 and the Commission made an order finding the value to be $5,250,000 which was confirmed by the court. In Los Angeles Gas & E. Co. v. California R. Commission, *supra,* where the claim was made of a $95,000,000 valuation, the court sustained the Commission's order, fixing it at $65,500,000. In United Gas Pub. Service Co. v. Texas (1938) 303 US 123, 127, 82 L ed 702, 22 PUR(NS) 113, 58 S Ct 483, the company claimed a valuation of $1,231,000. The Commission found the fair value $885,000. The court, in affirming the action of the Commission, in effect, stated the Commis-

sion would have been justified in fixing the value at $750,000. These cases are illustrative of the weight given to the order of the Commission where the testimony is conflicting. The circuit court erred in entering a decree finding the fair value of plaintiff's property to be in excess of $120,000,000.

Earnings

The next important question to which we must direct our attention is the earnings of the company, for even though the value of the company's property may not be as high as claimed, still the Commission will not be permitted to bring about confiscation of its property by establishing a rate so low as not to pay a fair and adequate return upon the valuation as fixed by the order of the Commission.

For the year 1936, it is agreed that the total income of the company was $36,647,888. The company claimed the total operating expenses for 1936, exclusive of depreciation, amounted to $28,947,790. Its depreciation charge for the same year was $2,892,311, and hence the net earnings available for return were claimed to be $4,807,789. These figures apply to property used and useful in the utility business and consequently do not exactly coincide with the balance sheet showing all sources of income and all expenses. The Commission found that all expenses, including depreciation, should not exceed $29,507,693. The court and master found the operating expenses, exclusive of depreciation, were $28,912,790, the depreciation $2,892,311, and the net earnings available $4,842,787, there being only a difference of approximately $35,000 between the master's finding and that claimed by the company. The principal difference of opinion between the company and the Commission arises out of the proper amount to be allowed as annual depreciation charge, and the elimination, by the Commission, of certain items of operating expense claimed by the company as properly deductible. These may be itemized as follows:

Depreciation allowed by the Commission	$1,800,000
Items disallowed under operating expenses:	
Reduction in taxes	750,000
Reduction in new business expenses	500,000
Elimination of portion of rental charge	200,000
Elimination of payments to Hellier Coal Co.	22,963
Elimination of donations	15,559
Elimination of portion of expenses for maintenance of mains	130,000
Elimination of portion of amortization of conversion expense	166,203

The discussion of these various items in the report of the master, and that of the Commission, and in the briefs of counsel, is exceedingly voluminous and goes into the minutest detail, and it would serve no good purpose here to do more than consider the general features of each claim.

Depreciation

The company claims it would require the setting aside of $2,892,311 for the year 1936 as a reserve for depreciation. This is the amount shown by the books and by the testimony of their expert witnesses as reasonable, and by the allowance of such sum in making their annual returns for income tax. The actual retirement as shown upon the books of the company for the year 1936 was $1,627,013. The evidence discloses all retirement

figures from 1929 to 1936, inclusive, and during this period of time such retirements averaged $1,155,701 per year. The amount set aside for depreciation for such period averaged $2,720,762 per year, and the average excess of depreciation provision over retirements was $1,565,061 per year. This disparity is caused by a difference of opinion as to the life of the several structures of the company and the present percentage condition of the property of the company. The expert witnesses are in hopeless conflict as to the amount that should be set up in a depreciation reserve.

In Lindheimer v. Illinois Bell Teleph. Co. (1934) 292 US 151, 78 L ed 1182, 3 PUR(NS) 337, 347, 54 S Ct 658, the court said: "Broadly speaking, depreciation is the loss not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered." In the case last mentioned, over a period of nine years, the actual retirements ranged from $11,990,000 to $15,828,000, but the depreciation reserve set up on the books during the same period ranges from $26,790,000 to $48,362,000. In discussing the point of the excessive amounts allowed for depreciation charges the court says: "We find this point to be a critical one. The questionable amounts annually charged to operating expenses for depreciation are large enough to destroy any basis for holding that it has been convincingly shown that the reduction in income through the rates in suit would produce confiscation."

[15] The Commission found the sum of $1,800,000 yearly, as sufficient to set up reserve for depreciation. This is criticized by the company as being without basis or foundation in the evidence. The entire financial history of the company was before the Commission. Officers of the company and expert witnesses were heard. The Commission is presumed to be an expert body itself, and the fixing of the amount allowable for annual depreciation was entirely within its province, which we are not at liberty to disturb unless we find its action arbitrary or unreasonable. We do not think the Commission has so offended, as a consideration of the entire record shows the amount allowed was within the range of the evidence on the question.

Taxes

[16] For the year 1935, the company actually paid taxes amounting to $1,500,468 and withheld payment of taxes in the amount of $827,519. The latter action grew out of litigation concerning the valuation of the company's property. The exact rate for 1936 was not known when the Commission filed its report, but later it appears that the rate for that year was $9.52 and the tax billed to the company consequently was $2,488,213. The witnesses tendered by the Commission assumed that there would also be liti-

gation concerning the 1936 taxes, and testified that $987,745 would be the same proportion of unpaid taxes for 1936, based upon the 1935 payments. The Commission fixed this amount at $750,000, and consequently reduced the operating expenses of the company by that amount. This, of course, assumes that the company would either be successful in litigating the taxes, or would withhold this amount. We believe this position unsound. It is, of course, the privilege of any taxpayer to resist unwarranted taxes, but in order to litigate taxes it is necessary to deposit with the treasurer at least 75 per cent of the amount billed, and it may be that the company will elect not to litigate taxes and have the amount paid properly allowed as an operating expense. The action of the Commission in this regard practically makes it necessary for the company to go into court and litigate taxes, but it does not furnish them the money with which to make the cash payment of 75 per cent of the amount in controversy. Taxes are imposed upon a utility under authority of a public law, and it is an unreasonable action upon the part of the Commission to arbitrarily assume, in advance of hearing, either that the utility should litigate its taxes, or that it will be successful if it does so. This is not a situation where the time of paying taxes is past and it is shown, as a matter of fact, that the expenditures have not been made, but this deduction is based upon the assumption of what will be done in the future. In this respect the act of the Commission was erroneous, and the company should have been allowed, as an estimated operating expense, the entire amount of taxes billed against it on its property used or useful in the business.

Elimination of Expense for Maintenance of Mains

[17] The evidence shows that for the year 1935, $466,350 was expended in the maintenance of the mains carrying gas. For the year 1936, the sum expended for like purpose was $680,929. In determining the operating expenses for the year 1936, the Commission cut down the allowance for maintenance of mains to $550,000. This was a reduction of $130,000. The reason shown in the testimony for the large increase of maintenance expense of 1936 over 1935 was the extreme cold weather, and this, to our mind, seems a reasonable explanation, as it is not only more difficult to excavate deeply frozen ground but the amount of labor performed per dollar is also decreased. We think the Commission was without authority to arbitrarily reduce an allowance shown to have been actually paid. We find no evidence that the company intentionally increased its maintenance expense or that it was any other than a bona fide expense. Where amounts of operating expenses are capable of definite proof, they may not be reduced by estimates of what the maintenance should have cost unless there is a further showing that, for some reason, the amount was improperly increased over a legitimate cost. The action of the Commission, in thus reducing the amount for maintenance of mains in the sum of $130,000, was erroneous.

Conversion Expense

[18] During the year 1931, the company spent $1,662,632 in adjust-

ing gas burners of its customers to make them suitable for burning gas containing a higher amount of heat units. This expenditure was authorized by the Commission, and was one that seems to be agreed to have been of an operating character. In 1932, the Commission entered an order that the money thus spent for converting the burners should be amortized over a period of ten years, out of income, with the right upon the part of the company to, at any time, charge such sum to profit and loss. In order to raise the money, the company, with the consent of the Commission, issued and sold securities which enabled it to do the work of conversion promptly, instead of spreading it over a period of time. We cannot see how authorizing the company to borrow the money to do an extensive operating service changes the character of the act. It was still an operating expense which the Commission authorized to be extended over a period of ten years. The Commission, when it excluded the amount of $166,263 from appellee's operating expense account, committed error, as it was a proper deduction from income for rate-making purposes.

Rent

[19] The evidence shows that the company maintains its offices in a building in the downtown section of Chicago, owned by it but not included as a part of its property used for utility purposes. It occupies about thirteen floors of this building. The balance of the building is rented to other tenants. Excluding the basement and main floor, the company charged itself $2.88 per square foot a year, and charged the other tenants in the building, for like space, at an average of $2.05 per square foot. The excess in amount of rent upon that portion of the building, comparable to other tenants, was $200,000 per year. This is another instance in the record in which concrete figures appear. The company owned the building and charged itself rent. It either charged itself too much to get the benefit of the profit of its nonutility property, or it charged the other tenants too little in order to fill the building, and thus make it a paying venture. This is another one of those matters that is exclusively within the jurisdiction and discretion of the Commission. The building is not a public utility and the amount of its earnings is not an issue. If the company was willing to lease substantially the same kind of space to the general public at $2.05 per square foot, we see no good reason why the customers of the company should be required to pay $2.88 per square foot. In this respect, we think the action of the Commission in reducing the operating expense account by the sum of $200,000 yearly for excessive rent, was correct.

Hellier Coal Company Expenses

[20, 21] Without comment, the Commission eliminated from operating expense the sum of $22,963 for the year 1936, and $28,170 for the year 1937. It appears, from the evidence, that the Commission, by order, approved the revised contract between the Peabody Coal Company and the company, and the contract between the company and the Hellier Coal Company which authorized these payments. There is nothing in the Com-

mission's finding concerning this item, except that the amounts should be excluded. If these contracts were made between the company and the coal companies and the amounts in question authorized to be paid, which does not appear to be disputed, it would seem that the Commission's former order authorizing and approving the contracts would be sufficient justification for including such amounts in operating expenses, and we, therefore, conclude that the Commission was in error in so excluding them. The Commission also eliminated from operating expenses the sum of $15,559 made as donations. The rule seems to be well settled that donations are not a proper operating expense unless it is shown that they will be of some peculiar benefit to the company or its patrons. Reno Power, Light & Water Co. v. Public Service Commission, 298 Fed 790, PUR1923E, 485; Denver Union Stock Yard Co. v. United States (1938) 304 US 470, 82 L ed 1469, 24 PUR(NS) 155, 58 S Ct 990. The Commission did not err in excluding this amount from operating expenses.

Reduction in Business Expense

[22, 23] The remaining item excluded from operating expense by the Commission is the sum of $500,000 in reduction of the new business expense. This item is discussed in considerable detail in both briefs and in the order of the Commission. The total amount claimed by the appellee as expense of getting new business for the year 1936 was $1,519,945. Included in this item is a loss arising out of the sale of gas stoves and appliances. The company claims as new business expense not only an amount for sales promotion, but also an amount to retain sales, and that the loss on the sale of appliances and the expenses connected therewith, should be regarded as a part of such cost and allowed as an operating expense. One of the justifications for the expenditure of large sums in sales retention expense grows out of the fact that an electric utility in the city is a competitor, and it is, therefore, called upon to take steps to prevent itself from losing business. The sales of appliances are claimed to have a direct connection with the sale of gas, as otherwise it is clear it would not be a proper expense of operation. A considerable part of this expense grew out of the method of selling gas stoves. Beginning in 1933, and continuing through 1935, the company had adopted a rental purchase plan for putting stoves or appliances on the premises of customers. Under that plan, the customer was allowed a full year as a trial period before he became obligated to purchase the appliances. At the end of that time, he either purchased and paid the agreed price or returned the appliance without any cost to him. A large number of the appliances were returned and were charged off 50 per cent as second-hand. The total cost of the sales promotion business along this line was over $700,000. Since gas appliances are sold by many other dealers and those sales made by the gas company, if conducted as a separate business, would not be subject to regulation as a utility, the advisability of such a method of promoting sales of gas and of the propriety of the amount thus expended becomes a matter entirely for the Commission. Ordinarily, in the

absence of a showing of inefficiency or improvidence, the court will not substitute its judgment for the management's judgment in amount of outlay expended in procuring new business or in holding business already obtained (West Ohio Gas Co. v. Ohio Pub. Utilities Commission (1935) 294 US 63, 79 L ed 761, 6 PUR(NS) 449, 55 S Ct 316), although the Supreme Court of the United States in the case of Denver Union Stock Yard Co. v. United States, *supra,* held that the same consideration should be given to the estimates of a company in such expenditures as it should to estimates of costs of other types of outlay.

It is manifest that after the customer has had the appliance for a year and turned it back and the charge is made upon the books for 50 per cent of the sales price as an operating expense, this opens the door to great latitude on the part of the utility, not only in engaging in competition in a line not regarded as a utility, but also in creating an unduly large expenditure for business promotion, to be charged as an operating account.

The evidence also shows that the sales of appliances were limited to the so-called upper class of people, where it did not run much chance of losing the appliance itself. It seems apparent that if the sales were confined to this class of customers, in the very nature of things it could not prevent them from adopting other methods of heating if the competing utility was able to show the superiority of its product. It is impossible to say what measure of benefit a plan of this kind would have upon gas sales, and that is the only justification for which it is offered. As pointed out above, in 1936 the total new business expense exceeded $1,500,000, and the Commission, for the same year, considered $500,000 of it as having been spent for business in reality nonuseful to the company or to the consumers of the company's product. We believe the evidence shows the expenditures of the company in this respect were excessive when we consider that the appliance sales operations in 1935 cost $799,000, and for the year 1936, $371,000, including commercial expense consisting of salaries paid to salesmen of merchandise. A further fact weakening the claim of the company to the full allowance of these items is the proof that a large number of the sales of gas ranges were replacements of other gas ranges already used by the customer. This would not be a promotion of the sale of gas but of the sale of stoves. From 1922 to 1932, when the appliance department was operated separately from the utility, the new business expense averaged about $700,000 per year, but when it was taken over as a part of the utility, new business expense increased to over $1,500,000 per year. We do not think the action of the Commission in this respect was unjustified, as, in the very nature of things, a sale of outside articles to promote the sales of a commodity regulated by a utility must be controlled by the Commission, as otherwise it would be possible to either raise the operating expenses to unreasonable heights or convert the utility into a mere medium of selling appliances and merchandise not regulated by the Commission.

The aggregate of the amounts that the Commission improperly deducted from the operating expenses amounts

to $1,069,226 which would, therefore, bring the proper amount chargeable against income, including depreciation, up to $30,576,919, and leave a net income of $6,070,969, or slightly in excess of 5 per cent.

The findings of the master and the circuit court, upon the items just above discussed, were all in favor of the company and, consequently, we determine that the lower court's action in fixing the amount of depreciation, the amount of rent, and the cost of new business, was erroneous. In determining the questions presented, not only on valuation of property, but also the amount allowable for depreciation and operating expenses, we have necessarily given considerable weight to amounts actually shown in evidence, because of the fact that the expert witnesses on both sides are in hopeless conflict, one side having a tendency to enhance values and costs and the other to decrease them. It appears that the Commission, to a considerable extent, governed its action by what it could ascertain from actual costs and disregarded, to a considerable extent, the testimony of expert witnesses. In view of the conflicting mass of testimony we do not see how it could have done otherwise.

We will not attempt to analyze the question of earnings or deduction for the succeeding year, other than to say the net result obtained by each party was based upon estimates from previous years, and the results reached produce substantially the same results as for the year 1936.

Fair Return

[24–27] This brings us to a consideration of the question of whether a net earning of 5 per cent justified the lower court in issuing an injunction. Had this been a proceeding to determine what a just and reasonable return would be, upon the valuation of the company's property, we would have had some doubt as to its adequacy. That, however, is not the issue here. The action of the Commission, in refusing to install schedule No. 19, is not before this court since the action of the Commission in fixing or refusing a rate can only be tested in the manner prescribed by statute. The question presented in this record is whether a net return of 5 per cent constitutes confiscation or, in other words, deprives the company of its property without due process of law, and this is a different question than determining a just and reasonable return upon property used and useful in the utility business. It has been held that a reasonable rate is something other or higher than one not strictly confiscatory, the difference, if any, being determined with finality by the appointed officers of the state. Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission (1934) 292 US 398, 78 L ed 1327, 4 PUR(NS) 152, 54 S Ct 763, 91 ALR 1403; Banton v. Belt Line R. Corp. (1925) 268 US 413, 69 L ed 1020, PUR1926A, 317, 45 S Ct 534. In State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. (1919) 291 Ill 209, PUR1920C, 640, 648, 125 NE 891, this court said: "Generally speaking, a rate which is nonconfiscatory would not be so unjust and unreasonable as would authorize setting aside the decision of the Commission fixing such a rate, . . . and yet there is a difference between a rate which is merely nonconfiscatory

and one which is just and reasonable, and it is the just and reasonable rate which the Commission is called upon to fix." In a judicial proceeding the ultimate question presented is, "Is the rate sought to be enjoined, confiscatory?" Alexandria Water Co. v. Alexandria (1934) 163 Va 512, 7 PUR(NS) 53, 177 SE 454. We have been unable to find any precise definition of what constitutes a rate that is confiscatory. It seems to us fair to assume that if the company could take a sum equivalent to the value of its property and invest it soundly, so as to insure a rate of return in excess of the return authorized by the Commission, this would be proof, or at least evidence, of confiscation, yet we are bound to take judicial notice of the fact, as well as evidence in the record, that it would be exceedingly difficult to invest a sum anywhere comparable to the value of appellee's property so as to earn 5 per cent. It appears that in 1936 the yield of the highest grade public utility bonds was between 3 per cent and 3½ per cent, and that between 1934 and 1936, first class public utilities were enabled to borrow upon their bonds money at from 3¼ per cent to 4¼ per cent, and that the average yield on the best bonds of railroads and industries, during 1936 and 1937, ranged from 3¼ per cent to 4½ per cent. It was also shown that state bonds and high-grade city bonds were sold to yield anywhere from 1¼ per cent to 2½ per cent. It also appears in the record that the company borrowed several million dollars for refunding purposes at 4 per cent. The fair rate of return is to be tested primarily by present-day conditions. United R. & Electric Co. v. West, 280 US 234, 74 L ed 390, PUR 1930A, 225, 50 S Ct 123. It seems reasonably clear that in view of present economic conditions, of which we take judicial notice (Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 77 L ed 1180, PUR 1933C, 229, 53 S Ct 637) that the company would have great difficulty in realizing 5 per cent upon the money it has invested in its utility enterprise, in securities which would be as sound and as certain to return a like percentage. In this view it cannot be said that the company has suffered any loss of property that is confiscation. On the other hand, in ascertaining a just and reasonable return upon the investment there are other elements taken into consideration which include not only the earnings of other comparable companies, but also earnings that will enable the company at all times to be reasonably certain to become the purchaser of its stocks and bonds, so as to readily procure money for refunding or extension purposes. United R. & Electric Co. v. West, *supra*. These elements are taken into consideration in fixing a just and fair return and doubtless the earnings of the company which the Commission estimated at 6 per cent, took into consideration such factors.

As pointed out above, however, the order and finding of the Commerce Commission on schedule No. 19 was not further tested by an appeal, as authorized by the statute, but appellee was content to abide by the finding of the lower court. Since we have no issue before us as to whether the return is just and reasonable, and only have determined whether the appellee established confiscation as alleged in

the complaint, there is ample authority to sustain the proposition that under the present economic conditions a return of 5 per cent cannot be regarded as confiscatory.

In view of the foregoing, the decree of the circuit court of Cook county is reversed and the cause is remanded, with directions to dismiss the bill of complaint.

Reversed and remanded, with directions.

Mr. Justice Jones, dissenting.

NEW JERSEY COURT OF ERRORS AND APPEALS

New Jersey Suburban Water Company

v.

Board of Public Utility Commissioners et al.

[No. 61.]

(— NJEq —, 8 A(2d) 350.)

Appeal and review, § 4 — Due process of law — Extent of review.

1. Due process of law can be satisfied only if there is the right of review to a court with jurisdiction to make an independent finding both of the facts and the law when it is claimed that a water rate as established by the Commission is confiscatory, p. 222.

Appeal and review, § 25 — Scope of review — Rate case.

2. The court of errors and appeals will consider a cause upon the merits on appeal from a judgment of the supreme court affirming a Commission order fixing a water rate, since all the proofs are before this court and it feels that the protracted litigation should be ended, although it ordinarily would deem it unwise to determine whether such rate is confiscatory on appeal from a judgment of the supreme court affirming such order where it is questionable whether the supreme court made the same factual findings as the Commission, p. 222.

Valuation, § 39 — Rate base ascertainment — Reproduction cost.

3. Reproduction cost is a relevant fact which should have appropriate consideration in determining the present fair value of utility property for rate-making purposes, but it does not furnish an exclusive test, and the weight to be given to reproduction cost should be determined in the light of the facts of the particular case, p. 224.

Valuation, § 31 — Governing factors — Use of property.

4. The value of a water company's plant for rate-making purposes depends upon use and is measured by the profitableness of present and prospective services rendered that are just and reasonable as between the owner of, and those served by, the property, p. 224.

Appeal and review, § 55 — Scope of review — Final result or details of value.

5. The court, in reviewing a rate order, is called upon to decide only whether the Board reached a proper, a right result, and it is unnecessary to determine whether the Board was right in its reasoning that the present value of utility property was to be determined upon the analogous basis of an initially overbuilt plant, p. 226.

Valuation, § 211 — Oversize water mains.

6. A water utility company, even though necessarily obliged to use a main double the necessary size and formerly needed, is entitled only to a fair return based upon the fair valuation of that main, with due regard to its excessive size and with due regard to the fair and just value of the services rendered, p. 226.

Depreciation, § 1 — Existence of.

7. A water plant with all additions begins to depreciate in value from the moment of its use, p. 227.

Valuation, § 99 — Accrued depreciation — Expert testimony.

8. The testimony of competent valuation engineers who examine utility property and make estimates in respect to its condition, is to be preferred to mere calculation based on averages and assumed probabilities in determining the present fair value thereof for rate-making purposes, p. 227.

Expenses, § 53 — Taxes — Nonutility property.

9. Taxes on property other than that which is used for or useful to the public should not be allowed as operating expenses, p. 228.

Return, § 16 — Right to compensation.

10. A water company, under all circumstances, is only entitled to a fair and just compensation for the services which it renders, p. 228.

Return, § 115 — Water.

11. A return to a water company at the rate of 6¾ per cent was sustained as fair and just in a proceeding to review a Commission rate order, p. 228.

Rates, § 134 — Comparative rates.

12. The Commission, in determining a fair and just rate to be charged by a water company, properly considered comparative rates in localities similarly situated, p. 228.

[September 22, 1939.]

APPEAL *from judgment of Supreme Court affirming Commission order denying petition for a water rate surcharge and fixing a water rate; affirmed. See 122 NJL 54, 28 PUR (NS) 57, 4 A(2d) 47.*

APPEARANCES: George W. C. McCarter, of Newark, for appellant; John A. Bernhard, of Newark (Frank H. Sommer, of Newark, of counsel), for respondents Board of Public Utility Commissioners; Michael J. Bruder, of Newark, for town of Harrison.

PERSKIE, J.: This is a water rate case. Two major questions require decision.

First: Did the supreme court, as it is claimed, erroneously exercise its supervisory power and fail fully to discharge its duty in affirming an order

of our Board of Public Utility Commissioners under date of October 4, 1937, fixing a rate of $99 per million gallons of water?

Second: Is the rate so fixed and determined, as it is claimed to be, unjust, unreasonable, and confiscatory?

Appellant, New Jersey Suburban Water Company, hereafter referred to as prosecutor (now insolvent and operated by a receiver in Chancery), entered into a contract on September 15, 1903, with the town of Harrison, hereafter referred to as respondent, because it is conceded that it is practically the only party affected, for the supply of its water. This contract fixed the rate at $82.50 per million gallons and was for a period of fifteen years with an additional 10-year option which respondent exercised.

On August 5, 1924, the prosecutor and respondent extended or renewed their contract of September 15, 1903, for a further period of fifteen years, so that, as lastly extended or renewed, it will expire in 1943. The rate, however, was fixed at $104.25 instead of $82.50 per million gallons.

On September 27, 1928, the Board of Public Utility Commissioners, hereafter referred to as the Board, fixed the rate at $99 per million gallons, effective January 1, 1929.

On April 11, 1930, prosecutor petitioned the Board for an increase in rate to $108.50 per million gallons; chancery litigation followed, and, on April 2, 1936, prosecutor amended its petition seeking an increase in rate to $140 with a surcharge of $14 and with an additional charge of $8.40 as against respondent alone. For reasons presently unimportant, these applications were dismissed without prejudice.

Thereafter, on April 30, 1936, prosecutor again petitioned the Board this time seeking a rate of $151.91 per million gallons. In addition thereto, prosecutor separately petitioned the Board for a surcharge of $22 for a period of ten years to make up past deficiencies.

The Board conducted formal hearings on both petitions which, by consent, were heard together. Upon consideration of the proofs offered by the respective parties, the Board, on October 4, 1937, denied prosecutor's petition for the surcharge; and, on the same day, the Board separately found and determined that the "existing rate of $99 per million gallons is not unjust or unreasonable under all the circumstances, and that, all the circumstances considered, $99 per million gallons is hereby determined, fixed, and prescribed as the just and reasonable rate to be observed, imposed and followed by the company."

On application to review each determination, Mr. Justice Parker denied a writ to review the Board's denial of prosecutor's petition for the surcharge but allowed a writ to review the Board's order fixing the rate of $99 per million gallons.

The supreme court affirmed the Board and dismissed the writ. 122 NJL 54, 28 PUR(NS) 57, 58, 4 A (2d) 47. In so doing, it said, inter alia, 122 NJL at pp. 55, 56:

"A careful examination of the testimony satisfies us that the Board was justified in its conclusions. No useful purpose is to be served in reviewing the testimony. Suffice it to say, that in our opinion there was ample testi-

mony to support its findings as a reasonable conclusion and, therefore, this court cannot substitute its judgment for that of the Board.

. . .

"Having concluded that the testimony justified the Board in fixing the rate complained of, it follows that there is no merit in the allegation of confiscation of property without due process of law."

Prosecutor challenges the propriety of the determination thus made. That challenge is divided into two major parts.

The first part claims that the supreme court did not fully discharge its duty in the manner required by law when it affirmed the action of the Board. The second part claims that the rate of $99 per million gallons, as fixed and affirmed, is unreasonable, unjust and confiscatory.

[1, 2] 1. In support of the first part of its challenge, prosecutor contends that the aforesaid quoted language of the supreme court fully justifies prosecutor's claim that the supreme court did not, as it was bound to do under the law in this type of case, make an independent finding of the facts in reaching its determination that the order of the Board was justified by the proofs. Public Service Gas Co. v. Public Utility Comrs. (1913) 84 NJL 463, 87 Atl 651, lastly affirmed 87 NJL 581, PUR 1915E, 251, 92 Atl 606, 94 Atl 634, 95 Atl 1079, LRA1917B, 930, LRA 1918A, 421; Erie R. Co. v. Public Utility Comrs. (1914) 85 NJL 420, 89 Atl 1001; West Jersey & S. R. Co. v. Public Utility Comrs. (1915) 87 NJL 170, 178, 94 Atl 57; Erie R. Co. v. Public Utility Comrs. (1916) 89 NJL 57, 68, 98 Atl 13, affirmed 90 NJL 672, 103 Atl 1052; Hackensack Water Co. v. Public Utility Comrs. (1921) 96 NJL 184, PUR1922C, 60, 115 Atl 528.

On the other hand, respondent claims that the supreme court did make an independent finding of the facts and correctly applied the law thereto. In addition, relying on the very cases cited by prosecutor and others presently cited, respondent claims that when conflicting proofs support the conclusion that the action of the Board is not arbitrary but is based upon legal proofs, the supreme court does not substitute its judgment for the judgment of the Board. For the Board, in finding a rate, acts as a legislative agency in the performance of a legislative duty. Cf. Interstate Teleph. & Teleg. Co. v. Public Utility Comrs. (1913) 84 NJL 184, 86 Atl 363; Plainfield-Union Water Co. v. Public Utility Comrs. 6 NJ Mis R 267, PUR1928C, 657, 140 Atl 785; West Jersey & Seashore R. Co. v. Public Utility Comrs. 8 NJ Mis R 212, PUR1930D, 206, 149 Atl 269.

The foregoing principles of law are, under the issues involved, in harmony with each other and with those pronounced by the Supreme Court of the United States. See cases collated in St. Joseph Stock Yards Co. v. United States (1936) 298 US 38, 51, 80 L ed 1033, 14 PUR(NS) 397, 56 S Ct 720. But when, as here, the claim is made that the rate, as found, is confiscatory, i. e., prosecutor is deprived of its property without due process of law contrary to the Fourteenth Amendment of our Federal Constitution, USCA, then again, both by our decisions (see cases first cited for pros-

ecutor), and by the decisions of our Federal Supreme Court, the requirements of due process can be satisfied only if there is the right of appeal or review to a court with jurisdiction to make an independent finding both of the facts and the law. Cf. Ohio Valley Water Co. v. Ben Avon, 253 US 287, 64 L ed 908, PUR1920E, 814, 40 S Ct 527; St. Joseph Stock Yards Co. v. United States, *supra.*

With these principles in mind, it is argued that the necessary inference to be drawn from the quoted language of the opinion of our Supreme Court is that the Supreme Court did make the same factual finding that the Board made. That may be so. But whether it did or did not make the required factual finding is not altogether free from debate. We regard it unwise to consider and determine a constitutional question upon such a state of the record.

We could, of course, remand the cause to the Supreme Court to make a definite finding. But we have frequently acknowledged our power to pass upon the merits in fairly comparable circumstances (Jordan v. Dumont (1928) 105 NJL 197, and cases collated at p. 198, 143 Atl 843; Harman v. Reed (1931) 108 NJL 191, 155 Atl 145), and have at times exercised that power when we deemed it desirable to do so. Smith v. Carty (1938) 120 NJL 335, 340, 199 Atl 12. Since all proofs are before us, and since we are of the opinion that the protracted litigation of the issues here involved should be ended, we choose to adopt the course we have followed in Smith v. Carty, *supra,* and shall consider and determine this cause upon the merits.

2. This brings us to the second part of prosecutor's challenge. It presents the pith of the issue. Is the rate, $99 per million gallons, unreasonable, unjust and confiscatory? Does it deprive prosecutor of its property, as it claims, without due process of law contrary to the Fourteenth Amendment of our Federal Constitution?

The Board found that the fair reproductive value of prosecutor's property, used and useful, and with due regard to the reasonable value of the services rendered, was $130,180. From that sum it deducted $83,315, as the estimated depreciation of the property, and to the balance of $46,865 it added $4,686 for going value, making a net value of $51,551. The Board allowed a rate of 6¾ per cent above the reasonable and fixed charges and, as already stated, the Supreme Court affirmed the Board. 122 NJL 54, 28 PUR(NS) 57, 4 A(2d) 47.

Prosecutor challenges the propriety of the results reached both by the Board and the Supreme Court. The argument in support of its challenge is separately captioned under the following headings: "Rate base, depreciation, going concern, operating expense, fair return, comparative rates, confiscation, and what the court should do." We shall consider each in the order stated.

Rate Base

Prosecutor's property consists of a 30-inch riveted steel main, five-sixteenths of an inch thick. It begins at a point where it connects with the main of the Passaic Valley Water Commission located at Belleville and Kearny avenues, Kearny, N. J., and runs thence southward from or along Kearny avenue a distance of about 2½ miles

to a point just beyond the northerly limit of Harrison. Special facilities are provided to carry this main over two railroad crossings; one is the "Greenwood Lake Railroad Division of the Erie" and the other is the "Erie Railroad at the northerly limit of Harrison."

Prosecutor uses this main to transport water which it buys from the Passaic Valley Water Commission at $78 per million gallons and sells for $99 per million gallons, or at a gross difference of $21 per million gallons.

From the record submitted we learn that in its earlier years prosecutor had four major customers, viz., the town of Kearny, with a population of about 40,000, the borough of East Newark, with a population of about 4,000, the town of Harrison, with a population of about 15,000, and the East Newark Realty Company (formerly Clark Thread Company).

In 1929, for example, prosecutor sold to Kearny, East Newark and Clark Thread Company, 1,156,972,500 gallons of water, and it sold to Harrison 1,002,548,000 gallons of water, or a total of 2,159,520,500 gallons of water.

Gradually prosecutor lost Kearny and East Newark as customers. Prosecutor concedes that the East Newark Realty Company is not under any contract to buy water from prosecutor and that it is a very small customer, so small that it is practically negligible. Thus prosecutor has virtually one remaining customer, namely, respondent, the town of Harrison whose contract, as we already know, expires in 1943.

We learn more from the record. The proofs indicate that there is little, if any, likelihood of prosecutor being able to recapture either Kearny or East Newark as customers; they having made other arrangements for their supply of water; that there is little, if any, likelihood of prosecutor obtaining other customers; and that there is nothing presently to indicate whether respondent shall or shall not continue as its customer after 1943.

[3, 4] In this posture of the proofs, which proofs are free from any substantial dispute, each side offered expert testimony as to the present value of prosecutor's property on the basis of cost of reproduction. Without attempting to detail the many objections which each side raises as to the probative value of the testimony so produced by the other side, it will suffice, in our view of the cause, if we merely state the results reached by the respective experts.

Mr. Vermeule, for prosecutor, fixed the fair value at $271,553. Prosecutor concedes that $260 should be deducted from this amount for two valves no longer used or useful, and a possible further reduction of $2,942.59 arising out of the dispute as to the actual length of the main.

For respondents the following fair values were fixed: Mr. Potts, $163,292; Mr. Cleveland, $174,383 and Mr. Williams, $163,292.

In light, however, of prosecutor's present and prospective business status and in light of the value of the services which it rendered, respondents' experts concluded that prosecutor's main was altogether too large. For a period of about two months prosecutor used a 12-inch temporary by-pass pipe across the bridge which pipe was sufficient to supply the water needs of

"Harrison, East Newark and Clark Thread Works." Potts and Williams testified (respondent characterized their testimony as the "Potts and Williams theory") that only 50 per cent of prosecutor's main was necessarily useful for the services rendered; that by the use of a small main plus increased pressure, claimed to be available by turning in the Great Notch reservoir which formerly served prosecutor's line and is still attached thereto, double the daily ordinary and extraordinary needs of respondent would be fully satisfied; and that because of these circumstances respondent's experts reduced their appraisement 50 per cent. For example, Mr. Potts reduced the fair valuation of prosecutor's property, used and useful, to $81,646.

Prosecutor, on the other hand, contends that the "Potts and Williams theory" is "untenable in law" and "unfounded in fact." That contention, generally stated, is based upon the premise that the main is not too large; that it has no right to exact from the Passaic Valley Water Commission the right to turn in the Great Notch reservoir; and that to do so would be neither practical nor safe. Prosecutor, moreover, stoutly contends that there is no basis, under the proofs, to support the Board's valuation of $130,180. In support of that contention prosecutor especially emphasizes the fact that the Board in 1929 placed the fair value upon the same plant of $197,000 after deducting $20,000 for depreciation and including going concern value.

The rationale of the Board's action is best gathered from its decision wherein it said:

"The testimony also shows that the present plant capacity is greatly in excess of the requirements of the town of Harrison. The Board recognizes that it cannot alone determine the true and fair value of the property used and useful by a comparison with a similar plant. Nevertheless, if a company were to seek rates as a going concern on the basis of an initially overbuilt plant, this Commission would be obliged to only allow a rate which would give a fair return alone upon the value of the property in so far as it was used and useful. The value of the overbuilding; the excess over the value of the property which was used and useful would not be included in the rate base. It therefore follows that when a plant, by reason of the changed conditions and novel circumstances presented in this case, becomes analogous to an overbuilt plant, such excess in property not used and useful cannot be included in the estimate of a rate base."

"In 1929 this Board fixed the value of the company's property used and useful at $197,000.00. At that time the company served various municipalities and private consumers. Today the company has virtually one customer, without firm assurance of the long retention of that customer, and it therefore becomes the duty of the Board to determine the value of the property used and useful in relation to the present service rendered and that which might reasonably be rendered in the reasonable future. To obtain this objective the Board has calculated that the value of the property now used and useful is $130,180.00, . . ."

Cf. San Diego Land & Town Co. v. Jasper (1903) 189 US 439, 447, 47 L ed 892, 896, 23 S Ct 571; Long

Branch Commission v. Tintern Manor Water Co. (1905) 70 NJ Eq 71, 78, 62 Atl 474, 477.

Neither industry of capable counsel, nor that of the court, has produced an adjudication in an altogether like situation. This is not the case of a mistaken judgment in building too large a plant. Cf. Elizabeth v. Public Utility Comrs. 99 NJL 496, 498, PUR1924C, 524, 123 Atl 358. Here the main was built sufficiently large to allow prosecutor to carry out its contracts to supply the needs of its earlier customers. Now it finds itself with altogether too large a plant on its hands, with only one customer, and with little, if any, prospect for future betterment of its unusual and unhealthy business status.

The fallacy, as we see it, with prosecutor's contention is that it, in effect, makes the cost of the reproduction of its plant, irrespective of the circumstances exhibited, the conclusive test of determining its present fair value. That is not the law. Reproduction cost, like historic costs and actual costs, "is a relevant fact which should have appropriate consideration," but does not furnish "an exclusive test." The weight to be given to reproduction costs "is to be determined in light of the facts of the particular case." Cf. Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 307, 308, 77 L ed 1180, 1193, 1194, PUR 1933C, 229, 53 S Ct 637, 644. Very aptly has it been held that "value depends upon use and is measured, or at least significantly indicated, by the profitableness of present and prospective services rendered that are just and reasonable as between the owner of and those served by the property." Denver Union Stock Yard Co. v. United States (1938) 304 US 470, 479, 82 L ed 1469, 1478, 24 PUR(NS) 155, 58 S Ct 990, and cases there cited.

[5, 6] We find it unnecessary to decide whether the Board was right in its reasoning that the present value of prosecutor's plant was to be determined upon the analogous basis of an initially overbuilt plant; we are called upon to decide only whether the Board reached a proper, a right result. Cf. Central R. Co. v. State Tax Dept. (1933) 112 NJL 5, 16, 169 Atl 489, certiorari refused by United States Supreme Court (1934) 293 US 568, 79 L ed 667, 55 S Ct 79.

With this objective in mind, we are satisfied, notwithstanding the fact that prosecutor was necessarily obliged to use its main, double the necessary size, to serve respondent, that prosecutor is entitled only to a fair and just return based upon the fair valuation of that main, with due regard to its excessive size and with due regard to the fair and just value of the services rendered. A valuation so reached, we think, is fair and just both to the owners of, and those served by, the property. Denver Union Stock Yard Co. v. United States, *supra;* Public Service Gas Co. v. Public Utility Comrs. *supra.*

Thus, with due regard to the excessive size of prosecutor's property, with due regard to the necessary use made thereof (and in that sense used and useful), and with due regard to that which is fair and just, as between prosecutor and respondent, we find, as a fact, that the fair valuation of prosecutor's property is the sum fixed by the Board, namely, $130,180.

Depreciation

[7, 8] The Board calculated the item of depreciation at 2 per cent per annum for thirty-two years and reached a total depreciation of $83,315. This amount was reached upon the basis of a 50-year life for the property and the Board indicated that its determined amount was "under the amount which (prosecutor) itself had depreciated the property upon its books ($138,012.90). . . ." Prosecutor denies that the item of $138,012.90 set up in its report, under "amortization or retirement reserve," represents an existing fund set up for depreciation. But however characterized, prosecutor concedes that it charged $33,000 to amortization but never in fact set it up; it admits that it earned this amount but paid it out in dividends. Prosecutor further claims, without supporting authority, that the item of $138,012.90 was set up at the direction of Federal Tax Authorities, and that it is nonexistent; it is purely mythical. Be that as it may, we do not find it necessary further to labor this point, or the point that prosecutor's present plight is largely due to the manner in which it manipulated and diverted its funds. The question is: do the proofs support the Board's determination? We think they do.

Now, good, common judgment compels the conclusion that "a water plant with all its additions, begins to depreciate in value from the moment of its use." Knoxville v. Knoxville Water Co. (1909) 212 US 1, 13, 53 L ed 371, 380, 29 S Ct 148, 152. Especially is this so when, as here, practically all the pipe is buried in the ground with the exception of a short distance for which it is above the ground but submitted to locomotive gases. The proofs, moreover, disclose that 22,000,000 gallons of water leaked out of the main in a year and that prosecutor was obliged to, and did, expend relatively substantial sums of money each year to repair leaks. For example, it spent $3,151.26 in 1929; $1,611.83 in 1930 and $2,337.25 in 1931. Additionally, experts for respondent testified that in the engineering profession, fifty years is considered as the average length of life for a pipe line of the character here involved. The average length of life thus reached is not purely theoretical; it is based, "on experience . . . practice . . . and study. . . ."

It is, of course, true that the testimony of competent valuation engineers, who examine the property and make estimates in respect to its condition, is to be preferred to mere calculations based on averages and assumed probabilities. McCardle v. Indianapolis Water Co. (1926) 272 US 400, 416, 71 L ed 316, 327, PUR 1927A, 15, 47 S Ct 144. But the testimony of prosecutor's expert does not come within the stated rule.

He examined the inside of the pipe at the Erie R. R. in 1928, at the Greenwood R. R. in 1932, and at several cuts into the pipe made at points where it rested in the earth trench, beyond the above two stated places. Such examinations were, indeed, limited and spotty in character. His testimony, moreover, that he did "not think that any deductions should be made for depreciation, deterioration . . ." lacks persuasion; he, in fact, did make an allowance of $20,000 for depreciation.

We are satisfied that the deduction of $83,315 for depreciation is fully supported by the proofs. We so find.

Going Concern Value

Prosecutor concedes that "going concern value" is not really involved in this case. In view of that concession, this item requires no discussion.

Operating Expenses

Prosecutor complains on but two scores.

[9] The first complaint concerns the item of taxation. The Board concluded "that municipal taxes properly chargeable are only those taxes upon property which is used and useful," and accordingly reduced the item of taxes in the operating expenses "in the ratio that the assessment on the property used and useful bears to the total assessment." In so doing, we hold, the Board was entirely correct; it exercised good judgment. The consuming public should not be forced to shoulder taxes on any property other than that which is used for or useful to it. If the taxes as assessed are, as contended, erroneously assessed, prosecutor has its remedy.

[10] The second complaint is that the Board made no allowance for amortization. Under the proofs of the case at bar, what has already been written under the heading of "Depreciation" is dispositive of this point. In the final analysis, as already observed, prosecutor, under all circumstances, is only entitled to a fair and just compensation for the services which it renders.

Fair Return

[11] Prosecutor insists that "no percentage less than 8 per cent will be adequate." We find no merit to this insistence. In light of all the circumstances exhibited in this cause, we find that the rate of 6¾ per cent is fair and just as between prosecutor and respondent.

Comparative Rates

[12] The Board held that "it must, under the circumstances of this case, take cognizance of existing comparative rates allowed for the sale of water in adjacent communities, and while it bears no absolutely controlling relation to the value of the service rendered by this company, it is an indicia of what may be termed reasonable value of the services and on the average the Board finds no rate existing in excess of $99 per million gallons."

The Board, under the circumstances, properly considered comparative rates in localities similarly situated. Cf. Bluefield Water Works & Improv. Co. v. West Virginia Pub. Service Commission, 262 US 679, 690, 67 L ed 1176, 1182, PUR1923D, 11, 43 S Ct 675; Public Service Gas Co. v. Public Utility Comrs. 84 NJL 463, 475, 87 Atl 651, 656.

Confiscation

It is interesting to observe, for whatever value, if any, it may have, that prosecutor carried its entire plant at the book value of $167,541.13, without deduction for depreciation; that as of January 1, 1935, it set up the sum of $134,102.90 under the heading of amortization or retirement reserve. By so doing, prosecutor's

books show a depreciated book value of all its property of $33,438.53 as against the depreciated value of $46,-865 fixed by the Board.

But be that as it may, having found that the rate fixed by the Board was fair and just, it necessarily follows, and we so hold, that prosecutor has failed satisfactorily to establish, as it was obliged to establish, that the rate fixed by the Board and affirmed by the supreme court, infringes constitutional immunities.

What the court should do. Judgment is affirmed with costs.

For affirmance: The Chancellor, Justices Parker, Bodine, Heher, and Perskie, and Judges Hetfield, Dear, Wells, Wolfskeil, Rafferty, and Hague —11.

For reversal: None.

MONTANA PUBLIC SERVICE COMMISSION

Re Montana-Dakota Utilities Company

[Docket Nos. 3065–3067, Report and Order No. 1749.]

Depreciation, § 66 — Natural gas — Reproduction cost basis.

1. An allowance for depreciation of a natural gas utility was deemed to be fair where such allowance represented approximately 5 per cent on the reproduction cost new of the utility's property used and useful in serving the public, p. 234.

Rates, § 649 — Hearing and notice.

2. The public and the utility should be given reasonable notice of a hearing to be held before the Commission to determine the reasonableness of rates, since justice requires that all parties to the proceeding have a reasonable opportunity to prepare and present their respective interests, p. 235.

Procedure, § 23 — Hearing and notice — Discretionary powers of Commission.

3. What constitutes reasonable notice to the public and the utility before a hearing is discretionary with the Commission, provided notice is at least given in strict conformity to the statutes, p. 235.

Rates, § 649 — Hearing and notice — Sufficiency of notice.

4. A utility had ample time within which to prepare for a hearing relative to rates where it had at least eighteen days actual notice of the hearing and it knew at least five months prior to such hearing that one would be held, p. 235.

Rates, § 649 — Hearing and notice — Purpose.

5. A notice of public hearing on utility rates should apprise the public and the utility as to what is in issue, although such a notice is not governed by the technical rules of pleading, p. 235.

Rates, § 649 — Hearing and notice — Sufficiency.

6. A notice of a public utility hearing concerning rates need not contain views of the Commission as to what evidence the utility or the public

should offer relative to the reasonableness or unreasonableness of rates, p. 235.

Return, § 9 — Fair value basis — Right to earn.

7. A utility is entitled to earn a fair and reasonable return on the present value of its property used and useful in the public service, p. 236.

Rates, § 120 — Reasonableness.

8. A gas consumer need only pay a reasonable rate, p. 237.

Valuation, § 327 — Franchises.

9. Items for franchises should not be considered in arriving at the rate base, p. 237.

Valuation, § 143 — Organization expenses — Amortization — Capitalization.

10. Intangibles involving preliminary and organization expense relating to the organization and establishment of a utility should not be capitalized or carried into the rate base, although they may be properly amortized over a period of years as an expense item, p. 237.

Valuation, § 288 — Working capital — Rate base.

11. A proper amount of working capital should be included in the rate base upon which a fair return should be allowed a public utility, p. 237.

Valuation, § 290 — Working capital.

12. The determination of the amount of working capital to be allowed in arriving at a rate base is a matter of judgment and discretion based upon the past experiences of the utility and its present requirements, p. 237.

Valuation, § 290 — Working capital — Determining factors.

13. Working capital depends generally upon what cash, credit, supplies, and equipment are necessary for the proper functioning of a utility plant, p. 237.

Valuation, § 313 — Working capital — Natural gas utility.

14. An allowance for working capital of a natural gas utility representing one-eighth of the annual operating expenses was deemed proper and sufficient for rate-making purposes, p. 237.

Depreciation, § 14 — Value basis.

15. The percentage for depreciation must be determined upon the actual value of utility property and not upon its original cost or gross revenue, p. 238.

Expenses, § 23 — Capital expenditures.

16. A patron of a utility is not required to pay through rates the amount expended by the utility for its plant, p. 238.

Depreciation, § 43 — Use of fund — Capital account.

17. Depreciation should not be permitted to be added to the utility's capital account but should be used only for the purpose intended, p. 238.

Valuation, § 81 — Relation to depreciation fund.

18. The true value of utility property used to earn a return cannot be enhanced by a consideration of the errors in management which have been committed in the past in using depreciation funds, because the depreciation fund must be absolutely used for the purpose intended, p. 238.

Evidence, § 16 — Competency — Rate proceeding.

19. Evidence, before it is admitted in a rate case before the Commission, should be at least competent, and where a document is introduced the parties should have the right to cross-examine its authors, p. 240.

Evidence, § 21 — Hearsay.

20. All evidence is hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to be produced, p. 240.

Valuation, § 409 — Evidence — Hearsay — Opportunity to cross-examine.

21. That neither the parties nor the Commission have the valuation engineers whose estimates have been offered before the Commission, in a rate case, to cross-examine as to the facts upon which their summary was based constitutes a basis for the rule excluding testimony, p. 240.

Return, § 101 — Natural gas.

22. A return of at least 6 per cent was held reasonable for a natural gas utility, p. 241.

[October 27, 1939.]

ORDER *requiring gas company to show why its rates should not be reduced; rate schedule prescribed in accordance with opinion.*

APPEARANCES: John C. Benson and Armin M. Johnson, Attorneys, Minneapolis, Minnesota, representing Montana-Dakota Utilities Company; James T. Shea, Attorney, Glasgow, representing natural gas consumers at Glasgow and Hinsdale; Fred C. Gabriel, County Attorney, Malta, representing natural gas consumers at Malta, Montana; C. F. Bowman, Chief Engineer, for the Commission; George Bartholomew, Auditor, for the Commission; John W. Bonner, Counsel, for the Commission.

By the COMMISSION: Pursuant to complaints filed with this Commission relative to the gas rates charged by the Montana-Dakota Utilities Company, a corporation, to its consumers in Glasgow, Malta, and Hinsdale, Montana, this Commission issued an order to show cause directed to the said utility requiring the utility to appear before the Commission and show cause why the gas rates charged by it in the aforesaid towns should not be reduced. The order to show cause was returnable on August 14, 1939. On August 14, 1939, a public hearing was had at Glasgow, Montana, on the order to show cause and this hearing continued during the 15th and 16th of August, 1939. At the hearing it was agreed by the Commission, the consumers, and the utility that evidence pertaining to the reasonableness of the rates charged by the utility to its consumers in Glasgow, Malta, and Hinsdale, Montana, would be heard at Glasgow, Montana; hence all evidence introduced on the days mentioned had to do with the reasonableness of the gas rates charged by the utility to its consumers in the aforesaid towns.

The Montana-Dakota Utilities Company serves natural gas to consumers in its so-called "Bowdoin Divi-

sion." The Bowdoin Division consists of the towns of Glasgow, Malta, Hinsdale, and Saco, Montana. Glasgow has a population of 2,216 persons and 882 patrons of the utility. Malta has a population of 1,342 persons and 467 patrons of the utility. Hinsdale has a population of approximately 570 persons and 73 patrons of the utility. Saco has a population of 506 persons and the utility has 52 patrons in this town. Saco, however, is not involved as far as the reasonableness of rates charged by the utility is concerned since the rates charged by the utility in this town are entirely different from the rates charged in the other towns which compose the Bowdoin Division. Saco is situated in the gas field and the utility has competition with a municipal plant in said town. Furthermore, Saco is served from the "collection" lines of the utility and the expense of serving this town is entirely lower and different than is the service to the other towns. The utility has no competition in the towns of Glasgow, Malta, and Hinsdale and these towns are removed from the gas field.

Fort Peck dam which is a government project is located approximately 18.6 miles southeast of Glasgow. The utility involved also sells gas for this project to the government, but this is strictly in accordance with a contract entered into by the utility with the government of the United States. The rates charged at Fort Peck by the utility are not involved in this proceeding.

The utility procures its natural gas which it sells to its consumers in Glasgow, Malta, and Hinsdale from a gas field in close proximity to Saco, Montana. This gas is transported from the field to Glasgow, Malta, Hinsdale, and Fort Peck. The utility has contracts with the owners of the various gas wells in the field and pays to such owners the sum of 5 cents per thousand cubic feet for all gas purchased by the utility.

In order to insure proper pressure the utility has constructed a compressor approximately 7 miles east of Saco and 33 miles west of Glasgow.

The collection system is from the wells in close proximity to Saco and, as heretofore stated, Saco is served from this system. The collection system runs from the said wells to the compressor mentioned, and from this compressor a transmission line runs a distance of 38 miles through Hinsdale to Glasgow and then from Glasgow to Fort Peck. Another transmission line runs from the said compressor station a distance of 32 miles to Malta.

The rates charged by the utility to its consumers in Malta, Glasgow, and Hinsdale are as follows:

General Purposes

Available for: Cooking, water heating, and heating purposes.

Rate:

First 3,000 cu. ft. of gas or less per month, $2.00 minimum bill.

Next 7,000 cu. ft. of gas per month, 57¢ per M cu. ft.

Next 15,000 cu. ft. of gas per month, 45¢ per M cu. ft.

Next 275,000 cu. ft. of gas per month, 40¢ per M cu. ft.

Over 300,000 cu. ft. of gas per month, 30¢ per M cu. ft.

Prompt payment discount: None.

Minimum bill: $2.00 per month for which customer will receive first 3,000 cubic feet of gas or less.

During the hearing the consumers of the utility were represented by counsel as was the utility. A great deal of evidence was introduced to show both the reasonableness and unreasonableness of the gas rates charged

by the utility to its consumers in the towns mentioned. In fact the transcript in this case consists of 554 pages. After the evidence was closed, briefs were filed by the parties and the matter then taken under advisement by this Commission.

At the beginning of the hearing the utility made a motion to dismiss the proceedings on various grounds, chief of which was that the utility did not have adequate notice within which to prepare for the hearing. The utility also objected that it could not ascertain from the order to show cause just what it was expected to produce in the way of evidence. It should be pointed out relative to these objections that the evidence shows that Mr. Gamble, secretary-treasurer of the utility, testified at the hearing that as far back as March 29, 1939, he knew of the complaints relative to the rates in the towns involved, and that at such time he knew that a hearing on the gas rates was contemplated. The evidence further shows that in April, 1939, Mr. Gamble called on one of the Commissioners as well as counsel for the Commission and asked that the hearing on the rates be set during the latter part of May, 1939, if possible. The motion for dismissal was taken under advisement by the Commission and the hearing proceeded.

At the hearing the utility introduced a summary of estimated cost of reproduction new less accrued depreciation as of December 31, 1938, prepared by Day & Zimmermann, engineers of Philadelphia, Pennsylvania. The said engineers who prepared this summary were not present at the hearing and thus could not be cross-examined. The aforesaid summary estimated the cost of reproduction new less accrued, observed depreciation as of December 31, 1938, of the Bowdoin Division, to be $900,845, which includes the utility's property used in supplying gas to Fort Peck and Saco. The utility introduced in evidence a statement showing the rate base in 1930 as determined by this Commission, together with subsequent additions as recorded in the company's books. This exhibit showed a total of $847,497.67. It should be observed that an item was included in the aforesaid total for franchises and intangibles in the sum of $2,448.59. Working capital is figured at $40,000. The utility at the hearing claimed a book value of $845,-925.78. This figure includes an item for intangibles of $16,880.75. The utility also maintained at the hearing that 5 per cent per year would be a fair allowance for depreciation. It should be further observed that the utility admitted during the hearing that it could find nothing in its depreciation fund, and that depreciation has been used by the utility for additions to the plant of the utility.

The utility maintains that its reserve for depreciation at the close of 1938 did not exceed $165,000 and that because of this fact the said book value of $845,925.78 cannot be reduced by more than $165,000. This would make the utility's claimed rate base in this case the sum of $680,925.78 as far as its book value is concerned.

Mr. Bartholomew, auditor for the Commission, who testified without contradiction, that after he investigated the books of the utility he arrived at a book valuation, including the town of Saco, of the utility's property in the sum of $714,882.48 with-

out depreciation. This figure is the figure which the utility's books show at its headquarters at Minneapolis, Minnesota. It should be pointed out, however, that this figure does not include any item for intangibles and franchises, which figure could not exceed the sum of $16,880.75, which was introduced at the hearing by the utility itself.

[1] Mr. Bartholomew testified that he did not include the intangibles because many of them were improper charges and not applicable to the Bowdoin Division and that these items should not be considered since the utility has already had at least ten years within which to write off these items through amortization.

In illustrating these improper items contained in the intangibles, counsel for the utility brought out on cross-examination of Mr. Bartholomew, such items as $50 for legal expense in connection with obtaining franchises in Wolf Point, Poplar, Bainville, and Culbertson, which towns were not involved in the investigation. Another item was the sum of $25 for legal expenses in connection with the utility's consumers in Poplar, which town was not involved in the investigation. Other items related to general expenses for the towns of Poplar, Bainville, Culbertson, Reserve, Plentywood, and Wolf Point. One of the items mentioned was in the sum of $500. Counsel for the utility seemed to be satisfied with the explanation of Mr. Bartholomew in contending that these items were not properly chargeable to the Bowdoin Division since they had to do with towns served by the utility with electricity which were not included in the investigation, nor are they any part of the Bowdoin Division of the utility. The evidence shows that the operating revenue of the utility for the towns of Glasgow, Malta, and Hinsdale, which includes farm lines, for the year 1938, less Saco, was $169,002.03, and the operating expenses for the utility for the towns mentioned for 1938 including Saco was $128,999.03. The operating revenue of the utility for the towns of Glasgow, Malta, and Hinsdale, less Saco, for the year 1937 including farm lines was $185,956.80, and the total operating expense for the same year including Saco was $128,074.01. The net operating revenue of the utility, therefore, was $57,882.79 for the year 1937 and $40,003 for the year 1938. The average net operating revenue of the utility for the Bowdoin Division for the two years, 1937, 1938, was $48,942.89. We have allowed a sum of $35,000 for depreciation for each year in the aforesaid operating expenses for the years 1937 and 1938 in arriving at the net operating revenues of the utility for those years. We believe this amount to be fair as it represents approximately 5 per cent on the reproduction cost new of the utility's property used and useful in serving the public.

The Board's engineer, Mr. C. F. Bowman, testified that in his opinion, taking into consideration everything used and useful by the utility in the public service, that the fair value of the same would be on the date of the hearing the sum of $530,647. This valuation was arrived at by inspection in the field, by observed depreciation, and taking every principle into account in arriving at the value of the property of the utility according to the the-

ory of reproduction new less accrued observed depreciation. From a consideration of all of the evidence in this case and taking into consideration every element and theory which will enable us to arrive at a fair value for this utility in order to determine whether or not its present rates are reasonable or unreasonable, we believe that the aforesaid figure of $530,647 truly represents the fair value of the Bowdoin Division of this utility including all of its property used and useful in the public service in said Division.

The utility's evidence relative to working capital was speculative in that no definite figure was given save and except that the utility claimed it should be allowed working capital in a sum of at least $40,000. This figure was not broken down so as to give us any definite knowledge as to what it entirely consists of.

[2–4] Before a hearing is held in determining the reasonableness of utility rates the public and the utility should be given reasonable notice of the hearing by the Commission. Justice requires that all parties to the proceeding have a reasonable opportunity to prepare and present their respective interests.

What constitutes reasonable notice to the public and the utility before a hearing in our opinion is discretionary with the Commission, provided, however, that notice is at least given in strict conformity to the statutes.

Section 3897, Revised Codes of Montana, 1935, provides that upon investigation or hearing by this Commission relative to utility rates or service that the utility and the complainants must be given at least ten days' notice of the time when and where such investigation and hearing will be held, at which hearing or investigation both the complainants and the utility shall have the right to appear by counsel or otherwise, and be fully heard.

The records in this case show that this Commission caused a notice of the hearing to be served on the public and the utility stating that the hearing would be held on August 14, 1939. On July 26, 1939, the utility received the show cause order setting this case for hearing. It is obvious, therefore, that the utility had at least eighteen days actual notice of the hearing. Furthermore, the evidence in the case conclusively shows that the utility knew in March, 1939, that a hearing on the rates involved in this case would be held by this Commission. In fact as the evidence shows in April, 1939, the utility asked the Commission and its counsel that the hearing be not set until the latter part of May, 1939, if possible. This Commission did not set the hearing until the 14th day of August, 1939. Under such circumstances, the utility certainly had ample time within which to prepare for the hearing.

[5, 6] A notice of public hearing on utility rates should apprise the public and utility as to what is in issue. However, such a notice in our opinion is not governed by the technical rules of pleading. In this case the notice of hearing recited in substance that because of complaints made to this Commission directed against the reasonableness of the natural gas rates charged by the utility for the furnishing of natural gas for commercial and domestic purposes to consumers in and about Glasgow, Malta, and Hinsdale,

Montana, that a public hearing would be held before the Commission at Glasgow on August 14, 1939, at 9 o'clock A. M. on said date, at which hearing a complete investigation of the reasonableness of the rates, tolls, charges, and schedules then in effect and then being charged by the utility for natural gas for commercial, domestic, and other purposes to all persons and corporations served by the utility in and about Glasgow, Malta, and Hinsdale, would be made if the circumstances warranted. The notice further recited that the hearing would be continued from day to day until a thorough investigation would be made of all such rates, tolls, charges, and schedules, and the utility was directed on the date mentioned then and there to show cause why an order should not be made substantially reducing such rates, tolls, charges, and schedules in said towns. The order further recited that at such hearing an investigation would be made by the Commission relative to the character and adequacy of the services furnished by the utility to the consumers in said towns as well as to the quality of the natural gas furnished to said consumers by the utility.

Section 3897, Revised Codes of Montana, 1935, does not specify any type of particular notice to be given the public or the utility of a hearing involving rates or services. The statute does, however, give the Commission a right to hold a public hearing upon complaints where "any of the rates, tolls, charges, or schedules, or any joint rate or rates, are in any way unreasonable or unjustly discriminatory, . . . or that any service is inadequate."

We believe that the aforesaid notice amply apprized the parties of what was to be investigated at the hearing involved. The utility concerned here has been engaged in various rate hearings and it is significant that it is the utility who is complaining about the notice rather than members of the public who are not generally engaged in rate hearings as is this particular utility. Certainly this utility and its counsel should know what evidence to present at a rate hearing under such a notice as given in this case. We do not believe that a notice of a public hearing concerning rates should contain views of the Commission as to what evidence the utility or the public should offer relative to the reasonableness or unreasonableness of rates. That function is strictly one for the parties. It must always be remembered that the Commission is not, strictly speaking, a party to the proceeding but sits as an administrative body to fairly and impartially weigh the evidence and then determine whether or not the rates are reasonable or unreasonable.

Because of the aforesaid reasons we do not believe that the motion made by the utility to dismiss is well taken and we, therefore, overrule the same.

Each utility case stands upon its own facts and it must be recognized that each utility presents an individual problem. Driscoll v. Edison Light & P. Co. (1939) 307 US 104, 83 L ed 1134, 28 PUR(NS) 65, 59 S Ct 715.

[7] We have heretofore held that a utility is entitled to earn a fair and reasonable return on the present value of its property used and useful in the public service. Re Scott Water Plant (1939) 31 MUR —, 31 PUR(NS) 124; Re Citizens Gas Co. (1938) 31

MUR —, 26 PUR(NS) 465; Re Billings (1938) 31 MUR —, 23 PUR (NS) 442; Re Horning (1938) 31 MUR —, 24 PUR(NS) 462; Miles City v. Montana-Dakota Utilities Co. (1938) 31 MUR —, 26 PUR(NS) 358, *ante;* Consumers v. Saltese Electric Light & Water Co. (1938) 31 MUR —, 26 PUR(NS) 333; Customers v. Kevin Gas Distributing Co. (1938) 31 MUR —, 26 PUR(NS) 327; Re Big Horn Oil & Gas Develop. Co. (1938) 31 MUR —, 27 PUR (NS) 41; Re Great Northern Utilities Co. (1938) 31 MUR —, 26 PUR (NS) 393, *ante*. See also Great Northern Utilities Co. v. Public Service Commission, 88 Mont 180, PUR 1930E, 134, 293 Pac 294.

[8] And we have heretofore held that a gas consumer need only pay a reasonable rate. Re Big Horn Oil & Gas Develop. Co. *supra;* Re Billings, *supra.*

[9] Taking the aforesaid fundamental principles into consideration, it is obvious that in determining the rate base to be used in this case that only legal items may be considered by us in arriving at a fair value of this utility. In accordance with the foregoing we do not believe that the items for franchises should be considered by us in arriving at the rate base in this case. As we said in Re Citizens Gas Co. *supra,* at p. 473 of 26 PUR (NS):

"In arriving at a rate base, franchises, although property which represent no real cost to the company when acquired, should not be considered since the fixing of a just and reasonable charge to be made by a public utility is not a taking from it of either the franchise or its use, in the sense of the constitutional guaranty, inasmuch as the franchise must be deemed to have been granted upon the implied covenant or subject to the implied condition that the rates should be just and reasonable and public regulation of the charges is merely the enforcement of the utility's duty. Brooklyn Union Gas Co. v. Prendergast (1925) 7 F(2d) 628, PUR1926A, 412; Georgia R. & Power Co. v. Georgia R. Commission, 278 Fed 242, PUR 1922C, 744, affirmed 262 US 625, 67 L ed 1144, PUR1923D, 1, 43 S Ct 680; Consolidated Gas Co. v. Newton, 267 Fed 231, PUR1920F, 483, affirmed 258 US 165, 66 L ed 538, PUR1922B, 752, 42 S Ct 264.

"For the reasons stated the alleged franchise value of the utility here must be stricken in determining its rate base."

[10] It should be pointed out that practically all of the so-called intangibles claimed by the utility in this case had to do with its system outside of the Bowdoin Division. These intangibles included legal expenses, etc., all having to do with organizing the utility.

Intangibles involving preliminary and organization expense relating to the organization and establishment of the utility should not be capitalized or carried into the rate base, although it may be properly amortized over a period of years as an expense item. Alexandria Water Co. v. Alexandria (1934) 163 Va 512, 7 PUR(NS) 53, 177 SE 454.

Here the utility has had over ten years to amortize its intangibles and this item will therefore be disregarded by us.

[11–14] We believe that there

should be included a proper amount of working capital as a part of the base upon which a fair return should be allowed a public utility. The amount required for working capital differs with different utilities and hence there is no set rule by which the amount of working capital can be truly ascertained. At any rate, in determining the amount of working capital to be allowed we deem it to be a matter of judgment and discretion, based upon the past experiences of the utility and its present requirements. In making such ascertainment for working capital we do not believe that the utility should be unreasonably restricted in amount, but on the contrary, the amount allowed for working capital should be reasonably sufficient to cover the needs of the utility beyond question. It is elementary that in addition to the plant used by the utility for rendering public service that the utility requires working capital.

Elements of working capital are for the most part fluid assets which have a market value distinct and independent of the physical plant. Items embracing working capital consist mainly of materials and supplies, cash, and collectible accounts. While there may be confusion relative to theories applicable in ascertaining the value of the plant of a utility it is, generally speaking, not difficult to ascertain what should be allowed for working capital items. Working capital is separate and distinct from fixed capital, the latter being represented by land, permanent structures, and intangible investments, while working capital depends generally upon what cash, credit, supplies, and equipment is necessary for the proper functioning of the plant. It is obvious from the foregoing that in determining here what items should be allowed for working capital for this particular utility, that the question is not one of determining an appraisal of the value of things found in the possession of the utility, but rather that of determining a reasonable allowance to the utility for working capital in order that it may efficiently and economically function. Indeed, it has been stated that "for rate-making purposes working capital may be defined as the amount of capital which the investors are required to put into the business over and above the investment in plant and intangibles in order to cover the gap by the cash expenditures in the production and delivery of service and the collection of the revenues from the sale of service." Whitten-Wilcox, Valuation of Public Service Corporations, (1928 Ed.) Vol. 2, p. 1520.

In accordance with the foregoing principles we believe that the sum of $15,653 allowed by our engineer for working capital is sufficient. It will be noted that this sum represents approximately one-eighth of the annual operating expenses of the utility for 1937, 1938, including the town of Saco. The sum allowed represents forty-five days operating expenses for the utility.

[15–18] In our opinion this utility is not using its depreciation fund for the purposes intended by good accounting practices and as governed by legal principles. To begin with, in order that the property of the utility be properly maintained and that the value upon which the return is based may not be lessened, a utility is, therefore, entitled to earn a reasonable sum for the de-

preciation of its property. We have no quarrel with the utility in this case as to its contention that 5 per cent is a reasonable amount to be used for depreciation, but we wish to point out that in determining any percentage for depreciation, this percentage must be determined upon the actual value of the property of the utility and not upon its original cost or gross revenue. Furthermore, depreciation should always be considered in determining the value of the utility's property for rate-making purposes. However, in so considering depreciation, it should be only considered for the purposes for which it is intended and is not to be used as a utility so decides. A patron of a utility is not required to pay through rates the amount expended by the utility for its plant. Oklahoma Nat. Gas Co. v. Corporation Commission (1923) 90 Okla 84, PUR1924A, 132, 216 Pac 917.

It should be further observed that depreciation should not be permitted to be added to the utility's capital account, but should be used only for the purpose intended. Louisiana R. Commission v. Cumberland Teleph. & Teleg. Co. (1909) 212 US 414, 424, 53 L ed 577, 29 S Ct 357.

Where, as here, the rates of a utility are in question, the true value of the property employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past because the depreciation fund must be absolutely used for the purpose intended. Knoxville v. Knoxville Water Co. (1909) 212 US 1, 13, 53 L ed 371, 29 S Ct 148.

The evidence in this case relative to what the utility is doing with its depreciation fund is far from satisfactory. We do find from the evidence, however, that the utility is using a part of its depreciation money for constructing additions to its plant. The fallacy of this procedure is self-apparent. If a utility is entitled to procure from the ratepayers the money with which to construct its plant or additions to the same, it would follow that since the ratepayers are contributing capital to the enterprise, that they have an equitable interest in the utility and hence the situation is analogous to a coöperative enterprise. Such is not the intention of the law relating to a utility such as we have here. When the ratepayers were asked to pay rates sufficient to enable the utility to construct additions to its plant as here, we said in this regard in cases involving a water utility which is governed generally by these same principles as is this particular gas utility: "The water consumer need only pay a reasonable rate. Here the water consumer is forced to pay a rate which will give the city a fair return on its investment, pay for the operation of the water department, contribute to reserve funds, which are not used as contemplated by law, and, in addition, contribute capital for the construction and betterment of the water system. And this is not all. By contributing capital for the construction and betterment of the water system, the consumer is penalized, since the city is requiring him to do something that he is not required to do by law, since he is, in fact, required to pay interest on his own money. Furthermore, when a part of the rate charged the consumer is placed in the depreciation account

of a utility, this account should be used for the purpose stated. The consumer, under such circumstances, has the right to assume that that account is for depreciation and that the utility will not divert it to any other purpose and when the life of the plant expires, ask the consumer to pay a higher rate than is reasonable in order to construct the plant anew. As is well stated in Knoxville v. Knoxville Water Co. (1909) 212 US 1, 13, 53 L ed 371, 29 S Ct 148:

"'A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued, the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.'" Re Billings (1938) 31 MUR —, 23 PUR(NS) 442, 453.

In line with the foregoing it is our opinion that this utility should immediately conform to proper accounting practices and legal principles relating to its depreciation fund.

[19–21] The Day and Zimmermann summary which was introduced in evidence by the utility with the view of presenting evidence as to its valuation for rate-making purposes was in our opinion nothing more than hearsay. We have at all times tried to follow the rules of evidence as far as possible in cases before us. In cases as serious as rate cases, evidence, before it is admitted, should be at least competent and where a document is introduced the parties should have the right to cross-examine its authors. Not only this, but in all fairness to the Commission, its members should be given an opportunity to question the authors of the document if they so desire. Only in this manner can an equitable, conscientious, and effi-

cient hearing and investigation be made. While the Commission may not have attained the dignity of a court and while it is not bound by technical rules of evidence, nevertheless, it deserves the respect due an administrative body and is bound only to admit relevant evidence.

It is stated as a general rule that all evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it. 22 C J 199.

Here the parties nor did the Commission have the engineers Day and Zimmermann to cross-examine as to the facts upon which their summary was based. This fact alone constitutes the basis for the rule excluding hearsay testimony as has been stated: "The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having a sufficient probative effect to raise an inference that the fact is as stated." 22 C J 202–205.

The appraisal of Day and Zimmermann was not even authenticated and in a matter similar to the matter under discussion here we said: "Those opposing the rates sought to introduce an estimate of an engineer who appraised the value of the utility for the purpose of this hearing, but the engineer making the appraisal was not present at the hearing, nor had he signed the appraisal which was sought to be introduced in evidence. Objection to the introduction as evidence of the appraisal was made by the utility and the objection was taken under advisement by this Commission.

"While it may be conceded that this Commission is not bound by technical rules of evidence, nevertheless, in a hearing before the Commission all parties must be fully apprized of the evidence submitted and must be given an opportunity to cross-examine witnesses and test the accuracy of their testimony. For this reason, the objection made by the utility to the appraisal made by the engineer must be sustained." Re Horning (1938) 31 MUR —, 24 PUR(NS) 462, 468.

We are frank to state that as matters stand relative to the Day and Zimmermann report it is useless as evidence as far as we are concerned and we, therefore, refuse to consider it in deciding the case.

In reviewing the evidence in this case, and after receiving all the facts and circumstances involved, we are of the opinion that the following rates will yield to the utility a fair and reasonable return on the present value of its property used and useful in the public service in the Bowdoin Division as far as the towns of Glasgow, Malta, and Hinsdale are concerned.

General Purposes

Available for: Cooking, water heating, and heating purposes.

Rate:
First 40 M cu. ft. per month, 45¢ per M cu. ft.
Next 60 M cu. ft. per month, 40¢ per M cu. ft.
Over 100 M cu. ft. per month, 30¢ per M cu. ft.
Prompt paypment discount: None.
Minimum bill: $1.50 minimum bill per month.

It should be pointed out that in establishing the foregoing rates that we are taking into consideration the operating expenses of the utility at Saco, Montana, and which is included in the operating expenses of the utility already given.

[22] Taking the rate base of the

utility to be $530,647, the average rate of return for the years 1937, 1938 was 9.22 per cent. The amount needed to make a 6 per cent rate on $530,647 is $31,838.82. Therefore, the average net operating revenue for 1937, 1938 was $17,104.07 over a 6 per cent return. The rates we are now establishing will reduce the net operating revenue of the utility in the amount of $17,048.16 leaving a return to the company on the rate base herein established of at least 6 per cent which we deem to be reasonable.

The aforesaid rates shall become effective November 1, 1939.

An appropriate order will be entered.

UNITED STATES SUPREME COURT

Howard S. Palmer et al.

v.

Commonwealth of Massachusetts

(No. 7)

(— US —, 84 L ed —, 60 S Ct 34.)

Service, § 30 — Jurisdiction of court — Bankruptcy proceeding — Service abandonment — Lack of state approval.

1. A Federal district court, in a bankruptcy proceeding, has no authority to authorize abandonment of local passenger station service by trustees, in reorganization proceedings under the Bankruptcy Act, before a state Commission has taken action in pending proceedings to obtain state consent to such abandonment, p. 243.

Interstate commerce, § 1 — State and national affairs.

2. The Supreme Court of the United States, in construing statutes, disfavors inroads by implication on state authority and confines restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress, p. 243.

Bankruptcy — Jurisdiction of district court.

3. Congress, in enacting the Bankruptcy Act, did not mean to grant to the district court the same power as to bankrupt railroads that they may have in dealing with other bankrupt estates; it has become the settled social policy of the states and the nation to entrust to administrative agencies the question of public utility service, p. 243.

[November 6, 1939.]

WRIT of certiorari to the Circuit Court of Appeals which court reversed a ruling of District Court authorizing abandonment of local railroad services, such railroad having filed petition for a reorganization under § 77 of the Bankruptcy Act; affirmed. For lower court decision, see 101 F(2d) 48.

APPEARANCES: Edward R. Brumley, of New York city, argued the cause for petitioners; Edward O. Proctor, of Boston, Massachusetts, argued the cause for respondent.

Mr. Justice FRANKFURTER delivered the opinion of the court:

[1–3] October 23, 1935, opened another chapter in the long history of the vicissitudes of the New York, New Haven and Hartford Railroad Company.[1] By filing a petition for reorganization under § 77 of the Bankruptcy Act ([March 3, 1933] 47 Stat. at L. 1467, 1474, Chap. 204, as amended by [August 27, 1935] 49 Stat. at L. 911, Chap. 774, and [June 26, 1936] 49 Stat. at L. 1969, Chap. 833, 11 USCA § 205), the New Haven invoked the shelter of the United States district court for the district of Connecticut. There it has since remained. An episode in this new chapter, already four years old, is presented by this case. We brought it here (1939) 306 US 627, 83 L ed 1030, 59 S Ct 644, because it raises important questions under the railroad bankruptcy law, particularly where it intersects the regulatory systems of the states. The district court assumed power to supplant the relevant authority of the state—an authority which, apart from proceedings under § 77, has not been conferred by Congress either upon the Federal courts or the Interstate Commerce Commission. The circuit court of appeals, one judge dissenting, reversed the district court, Converse v. Massachusetts (1939) 101 F (2d) 48, 38 Am Bankr Rep (NS) 758.

A summary of the facts will lay bare the legal issues. On December 28, 1937, the bankruptcy trustees of the New Haven, acting under the requirements of Massachusetts law,[2] applied to that commonwealth's Department of Public Utilities for leave to abandon eighty-eight passenger stations.[3] Twenty-one hearings were held by the Department on the questions raised by this application. During the pendency of these hearings and before the Department had taken any action, the present litigation was initi-

[1] Brandeis, "Financial Condition of the New York, New Haven and Hartford Railroad Co." (1907); Re New England Investigation (1913) 27 Inters Com Rep 560; Re Financial Transactions of New York, N. H. & H. R. Co. (1914) 31 Inters Com Rep 32; Report of the Joint New England Railroad Committee to the Governors of the New England States. (Storrow Report.) (1923.)

[2] Mass. Gen Laws (Ter. Ed.) Chap. 160, § 128, provides: "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station . . . nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the Department [of Public Utilities] after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

See also Mass. Gen. Laws (Ter. Ed.) Chap. 159, § 16, vesting general control over intrastate railway services in the Department of Public Utilities.

[3] The application also sought permission to effect certain other curtailments of passenger service. Some of the stations were situated on the lines of the New Haven, most of them on the lines of the Old Colony Railroad, and some on the lines of the Boston and Providence Railroad.

The New Haven in 1893 leased for ninety-nine years all the properties of the Old Colony, including the Boston and Providence lines which the Old Colony had leased for ninety-nine years in 1888. On June 1, 1936, the New Haven trustees disaffirmed, as they were empowered to do under § 77, the Old Colony lease. After the disaffirmance the New Haven operated the lines on account of the Old Colony. On June 3, 1936, the Old Colony itself commenced proceedings under § 77. The trustees of the New Haven were then appointed trustees for the Old Colony.

ated in the New Haven bankruptcy proceedings by creditors of the debtor for an order directing the trustees to abandon these local services. The trustees joined in the prayer, while the commonwealth denied the jurisdiction of the district court and asked that the proceedings before the Department be allowed to reach fruition. The district judge ruled that § 77 gave him the responsibility of disposing of the petition on its merits and, having taken evidence, gave the very relief for which the trustees had applied to the Department and which was still in process of orderly consideration.

Plainly enough the district court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere.[4] But such absorption of state authority is a delicate exercise of legislative policy in achieveing a wise accommodation between the needs of central control and the lively maintenance of local institutions.[5] Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. Minnesota Rate Cases (Simpson v. Shepard) (1913) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA(NS) 1151, Ann Cas 1916A, 18; cf. Kelly v. Washington ex rel. Foss Co. (1937) 302 US 1, 82 L ed 3, 58 S Ct 87.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states.[6] Even when the

[4] E. g., Shreveport Cases (Houston, E. & W. T. R. Co. v. United States) (1914) 234 US 342, 58 L ed 1341, 34 S Ct 833; Wisconsin R. Commission v. Chicago, B. & Q. R. Co. 257 US 563, 66 L ed 371, PUR 1922C 200, 42 S Ct 232, 22 ALR 1086. See 1 Sharfman, "The Interstate Commerce Commission," pp. 82–86, 219–225. For the careful observance of state interests in applying the Shreveport doctrine, see Illinois C. R. Co. v. Public Utilities Commission, 245 US 493, 62 L ed 425, PUR 1918C 279, 38 S Ct 170, and Florida v. United States (1931) 282 US 194, 75 L ed 291, 51 S Ct 119.

[5] See Clark, "The Rise of a New Federalism," passim.

[6] The controlling Massachusetts statute has been in force since 1911. But Massachusetts has exercised control over its railroads through administrative machinery ever since the famous Adams Commission in 1869. See First Annual Report, Board of Railroad Commissioners of Massachusetts, Public Document No. 40, pp. 3–12 (1870); Hadley, "Railroad Transportation" (1885 ed.) pp. 136–139.

Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, Colorado v. United States (1926) 271 US 153, 70 L ed 878, 46 S Ct 452,[7] this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. Re Kansas City S. R. Co. (1925) 94 Inters Com Rep 691; see Re Morris & Essex R. Co. (1931) 175 Inters Com Rep 49. If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change.

We are asked to find it in § 77 (a) granting to the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located,"[8] and in § 77 (c) (2) permitting the trustees, subject to the court's control, "to operate the business of the debtor."[9] In order to expedite the reorganization of insolvent railroads, such broad and general provisions doubtless suffice to confer upon the district courts power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings. Cf. Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. R. Co. (1935) 294 US 648, 79 L ed 1110, 55 S Ct 595, 27 Am Bankr Rep (NS) 715. But the district court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion," as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."[10]

Not only is there no specific grant of the power which the district court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act.[11] But the long history of Federal railroad receiverships, with the conflicts they frequently engendered between the Federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate.[12] Also an

[7] For illustration of the scrupulous regard for local authority and local interests shown by the Commission in the exercise of its control over abandonments, see 2 Sharfman, "The Interstate Commerce Commission," pp. 264–269.

[8] § 77 (a), 47 Stat. at L. 1474, Chap. 204, as amended in 1935 by 49 Stat. at L. 911, Chap. 774, 11 USCA § 205(a) provides so far as here relevant: "If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

[9] "The trustee or trustees so appointed . . . shall have . . . subject to the control of the judge and the jurisdiction of the Commission as provided . . . the power to operate the business of the debtor." § 77(c)(2), 47 Stat. at L. 1475, Chap. 204, as amended by 49 Stat. at L. 914, 915, Chap. 774, 11 USCA § 205 (c)(2).

[10] See Converse v. Massachusetts (1939) 101 F(2d) 48, 51, 38 Am Bankr Rep (NS) 758.

[11] See H. Rep. No. 1897, 72d Congress, 2d Session, p. 5.

[12] See Chapter XXII "Railroad Receiverships" in 1 Gresham, "The Life of Walter Quintin Gresham, pp. 366–378; Jacobs "The Interstate Commerce Commission and Inter-

insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission.[13] Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission.[14] Thus, in § 77 (c) and § 77 (o) the power of the district courts to permit abandonments is specifically conditioned on authorization of such abandonments by the Commission. In view of the judicial history of railroad receiverships and the extent to which § 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road.[15] About a fourth of the railroad mileage of the country is now

state Railroad Reorganizations," 45 Harvard L. Rev. 855; Lowenthal "The Investor Pays." See also remarks by Senator Wheeler, as Chairman of the Committee on Interstate Commerce, introducing the amendment of 1935, 79 Cong. Rec. pt. 13, p. 13,764.

[13] See 76 Cong. Rec. pt. 5, p. 5358 (remarks of Representative LaGuardia): "I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission." The suggestion for administrative receiverships originated with the late Chief Justice Taft, when circuit judge, in an address before the American Bar Association. Taft "Recent Criticism of the Federal Judiciary," Reports of the American Bar Association (1895) 237, 264.

[14] § 77(c)(1) requires the appointment of trustees to be ratified by the Commission; § 77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; § 77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; § 77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; § 77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; § 77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; § 77(c)(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §§ 77(d) and 77(e) gives to the Commission control over any proposed plan of reorganization; § 77(p) gives to the Commission control over the solicitation of proxies or deposit agreements.

See also H. Rep. No. 1897, 72d Congress, 2d Session, pp. 5, 6; H. Rep. No. 1283, 74th Congress, 1st Session, pp. 3–5; S. Rep. No. 1336, 74th Cong., 1st Session, pp. 4–6; Report, Federal Coördinator of Transportation, 1934, H. Doc. No. 89, 74th Cong. 1st Session, pp. 100, 101; 76 Cong. Rec. pt. 5, pp. 5108–5110; 79 Cong. Rec. pt. 12, p. 13,301, pt. 13, pp. 13,764, 13,767.

[15] "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto . . . the laws of any

in bankruptcy.[16] The petitioners ask us to say that district judges in twenty-nine states have effective power, in view of the weight which often attaches to findings at nisi prius, to set aside the regulatory systems of these twenty-nine states with all the consequencies implied for those communities. Congress gave no such power.

Arguments of convenience against denial of the existence of this power have been strongly pressed upon us. Continuance of state control over these local passenger services will, it is urged, impair the bankruptcy court's power to formulate a reorganization plan for the approval of the Interstate Commerce Commission. Such embarrassments, due either to the time required for exhaustion of the orderly state procedure or to the financial losses that may be involved in the continuance of local services until duly terminated by the state, may easily be exaggerated. It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, do supplant state authority. But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesmanlike imagination that transcends the wisdom of local attachments.

Other arguments, drawn from the legislative history of § 77 and from the general equity powers conferred by § 77 (a) and § 77 (c) (2),[17] were urged but we deem it unnecessary to say more.

The decree below is affirmed.

Mr. Justice Butler took no part in the consideration and decision of this cause.

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state or the decision or order of any state authority to the contrary notwithstanding." § 77(f) of 11 USCA § 205(f).

The records of the Interstate Commerce Commission disclose that eight plans of reorganization have thus far been filed with the district court in the New Haven proceedings and transmitted to the Interstate Commerce Commission. Proceedings before the Commission had progressed to the point where an examiner's report was filed; but the report was withdrawn for further hearings. The present record fails to show what, if any, disposition of the Old Colony lines of any of these plans proposed to make.

[16] On October 23, 1939, there were 61,292.69 miles of railroad in bankruptcy proceedings under § 77. This mileage includes lines in 29 states.

[17] Re Tyler (1893) 149 US 164, 37 L ed 689, 13 S Ct 785, and other decisions of this Court cited by petitioners deal with attempts at "physical invasion" of the properties held in the custody of a Federal court. See 149 US at p. 182. Section 65 of the Judicial Code ([March 3, 1911] 36 Stat. at L. 1104, Chap. 231, 28 USCA § 124) decisively indicates that Congress did not intend that those who operate a business under the control of a Federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.

WISCONSIN SUPREME COURT

City of Milwaukee

v.

Public Service Commission et al.

(— Wis —, 287 NW 682.)

Appeal and review, § 80 — Parties — City not affected by order.

A municipality furnishing water to another city cannot seek a review of a Commission order authorizing a town to construct mains and other facilities within its territorial limits, on the ground that the other city would furnish a water supply to the town, where the order does not adopt any source of water supply for the property.

[October 10, 1939.]

APPEAL *from order sustaining demurrer in suit to set aside Commission order authorizing a town to construct water utility property; affirmed.*

This action was begun on April 16, 1938, by the city of Milwaukee, plaintiff, against the Public Service Commission of Wisconsin, town of Greenfield, and city of West Allis, defendants, to set aside an order of the Public Service Commission granting authority to the town of Greenfield as a public water utility to construct mains and an elevated tank in the Lapham-Orchard Sanitary District in accordance with the plans and proposals set forth in the application. In the complaint it is alleged: "That, as your plaintiff is informed and believes, said plans and proposals provide that said defendant, town of Greenfield, connect with the waterworks system of the defendant, city of West Allis."

After the granting of the authority to the town of Greenfield to construct the mains and tank, the plaintiff appeared and demanded a rehearing. Accordingly, a rehearing was had. Upon the rehearing the plaintiff made the same contentions that it makes here. In response to the objections of the plaintiff, the Commission made the following finding: "We fail to perceive how the order of February 19th adopts any source of water supply for the operation of the property therein authorized to be constructed. True, that matter was considered at the hearing because the city of Milwaukee was permitted to intervene in the proceeding and interpose objections to the construction of the utility property; those objections being based upon its fear that the city of West Allis would furnish the water supply required. Nevertheless, the order complained of does not adopt any source of water supply for the operation of that prop-

erty; and the construction of that property would have been authorized by the Commission regardless of what the proposed supply of water might be unless it appeared that it was impossible to obtain any such supply."

The rehearing was denied and this action was begun. The facts were fully set out in the plaintiff's complaint, to which the defendants severally demurred. The several demurrers were sustained on the ground that no cause of action was stated in the complaint. The circuit court said: "Briefly stated the facts are that the plaintiff city of Milwaukee is a public utility furnishing water to the defendant city of West Allis. The defendant town of Greenfield applied to the defendant Public Service Commission for an order permitting the town of Greenfield to construct certain water utility property within its territorial limits. It is contemplated that when so constructed the water to supply that territory will be obtained from the city of West Allis. Thus, if the plans are carried out, the necessary water might ultimately be supplied by the city of Milwaukee. The Commission entered an order for the construction of such necessary water mains, etc. The city of Milwaukee brings this action to set aside said order of the defendant Commission. It seems clear to this court that the demurrers must be sustained. The order involved can in no manner affect the rights, duties, or liabilities of the city of Milwaukee. The city of Milwaukee will have its day in court before the Commission when that body enters an order directing or prohibiting the city of West Allis to supply the water to the town of Greenfield with which to supply the new water utility territory. Until that question is at issue the rights, duties, or liabilities of the city of Milwaukee cannot possibly be affected. The order entered simply permits the construction of the necessary water mains, etc. In plain language, the entry or denial of such an order is no concern of the city of Milwaukee and therefore the plaintiff has not stated a cause of action."

From the order sustaining the demurrers entered on August 8, 1938, the plaintiff appeals.

APPEARANCES: Walter J. Mattison, City Attorney, and Joseph L. Bednarek, Assistant City Attorney, both of Milwaukee, for appellant; John E. Martin, Attorney General, Harold H. Persons, Assistant Attorney General, H. T. Ferguson, Special Assistant Attorney General, and Fred L. Luehring, of Milwaukee (Philip H. Porter, of Madison, of counsel), for respondent.

ROSENBERRY, C. J.: It is considered that the trial court correctly held that upon the facts stated in the complaint and the exhibits annexed thereto, it clearly appears that the city of Milwaukee is in no manner affected by the order and so has no interest which entitles it to maintain an action to set aside the order of the Public Service Commission authorizing the town of Greenfield to construct mains and an elevated tank as set out in its application.

The order appealed from is affirmed

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT, D. MONTANA, BILLINGS DIVISION

Northern Pacific Railway Company

v.

Board of Railroad Commissioners of State of Montana et al.

[No. 3071.]

(28 F Supp 810.)

Service, § 265 — Discontinuance of trains — Factors considered — Public interest.

The court will consider whether or not public interest demands the continuance of the operation of trains in determining whether the Commission should be enjoined from enforcing its order requiring a railroad to continue the operation of such trains.

[August 28, 1939.]

SUIT *to enjoin the Commission from enforcing its orders denying application of a railroad for permission to discontinue its operation of certain passenger trains; granted.*

APPEARANCES: Gunn, Rasch, Hall & Gunn, of Helena, Mont., for plaintiff; Harrison J. Freebourn, State Attorney General, and John W. Bonner, Assistant State Attorney General, for defendants.

Before Haney, Circuit Judge, and Baldwin and Pray, District Judges.

PRAY, D. J.: The principal question for determination in the above-entitled cause is whether public convenience and necessity require the operation of passenger trains numbered 291 and 292 on the Northern Pacific Railway between Helena and Garrison, Montana, and involves the validity of an order of the Board of Railroad Commissioners of Montana denying the application of the plaintiff railway company for permission to discontinue said passenger trains. The validity of the order is challenged on the grounds that it deprives plaintiff of its property without due process of law and also that it imposes an undue burden upon interstate commerce.

On the other hand, the defendants claim that the Board's order should not be set aside unless the evidence is clear and convincing that the order is unreasonable; that the public interest demands a continuance of this train service, and that the expense of maintaining the trains is not so unreasonably out of proportion to the convenience of the public as to impose an unlawful burden upon plaintiff. It

appears that the only places served by the trains in question and which are not served by the busses of the Northern Pacific Transport Company are those located along the line of railroad between Helena and Calcium, a point about 27 miles west of Helena; that the intervening territory is sparsely settled; that between these two places on the line of railroad, where abovementioned trains stop for passengers, are Birdseye, Austin, Weed, Skyline, Blossburg, and Rich Spur, and that Birdseye, Weed, Skyline, Rich Spur, and Calcium are points where no agent or station is maintained, and that only railroad employees reside at any of these places, except Austin, which has a population of sixteen people. The company maintains agents at Blossburg and Austin. Plaintiff asserts that if trains 291 and 292 are finally discontinued, adequate passenger transportation will be afforded between Helena and Calcium by transcontinental passenger trains numbered 3 and 4 which are now stopping on signal to receive and discharge passengers at Birdseye, Austin, Weed, Skyline, Blossburg, Rich Spur, and Calcium, and that such stops were not made prior to discontinuance of trains 291 and 292. That plaintiff has made arrangements with the Northern Pacific Transport Company to operate a truck in connection with its bus line between Helena and Garrison to carry the mail, heavy baggage, express, and milk which were carried on trains 291 and 292.

Public convenience and necessity do not seem to require the operation of trains 291 and 292 between Elliston and Garrison; here Federal Aid Highway No. 10 runs near and parallel to this section of the railroad. Whether these trains should be continued between Helena and Elliston would depend upon whether public convenience and necessity so require.

Plaintiff submitted proof of the number of passengers carried and amount of revenue derived from the operation of these trains for a period of 163 days, from October 20, 1936, to March 31, 1937, showing an average daily cost of $49.69 and an average daily revenue of $13.01, and that the actual out-of-pocket loss for the 163 days was $5,928.84. Plaintiff shows that this amount does not represent the entire loss, as fixed and overhead expense, such as maintenance of tracks, stations and buildings, superintendence, clerical expense, equipment, depreciation, taxes, and interest, are not included.

An interesting compilation of data appears in Exhibit "F," attached to the complaint and established by proof, showing that the average number of revenue passengers carried on train 291 during the test period of 163 days to Birdseye was one every 5.6 days, to Austin one every 3.7 days, to Skyline one every 10.2 days, to Blossburg one every 3.3 days, to Rich Spur one every 81.5 days, and to Calcium one every 12.5 days; and the average number of revenue passengers carried on train 291, during said test period, from Birdseye was one every 81.5 days, from Austin one every 32.6, from Blossburg one every 3.4 days, from Rich Spur one every 14.8 days, and that no passengers were carried during this period of 163 days from either Skyline or Calcium.

In respect to train 292 a similar

state of facts is shown to exist during the test period, as follows: To Rich Spur one every 13.6 days, from there one every 163 days; to Blossburg one every 3 days, from there one every 3.3 days; to Austin one every 40.8 days, from there one every 3.3 days; to Birdseye one every 32.6 days, from there one every 32.6 days; to Calcium none, from there one every 14.8 days; to Skyline none, from there one every 16.3 days, and no passengers were carried on either train during the test period to or from Weed. Other tests were made at later dates showing a similar condition in respect to passenger travel. It does not appear that residents of these different places can very well complain of inconvenience in the time of arrival and departure of transcontinental trains 3 and 4 now stopping on signal, although objection is made on this ground by defendants' witnesses. No. 3 leaves Helena at 6:33 A. M., arriving at Elliston at 7:56 A. M., and at Garrison at 8:35 A. M. Train No. 4 leaves Garrison at 8:40 A. M., and arrives at Helena at 10:35 A. M.

The financial condition of plaintiff is set forth in the complaint and supported by proof, and discloses a considerable loss in business. Worse in 1938 than in 1937. It seems to the court that the testimony of the defendants' witnesses as to convenience and necessity does not off-set the facts established by plaintiff showing how sparsely populated is the region from Helena to Garrison, and particularly to Elliston, and how little use was made of trains 291 and 292, and especially when considered in connection with the service provided by trains 3 and 4, and the busses and trucks now in operation. Both sides have cited Great Northern R. Co. v. Nagle (1936) 16 F Supp 532, 537, wherein a statutory 3-judge court at Great Falls said: "But the question we are required to answer is: Does the public interest demand a continuance of the aforesaid trains?" That inquiry might properly be made in this case. An entirely different state of facts existed in respect to train service at Lewistown and Sweet Grass in the Great Northern Case than is found in this case. At Sweet Grass there would have been no train service at all, with some of the places on the line not served by busses, and at Lewistown an inadequate service—unreliable as to time, with towns in populous farming communities left with insufficient or no bus service at all, if the court had discontinued the Lewistown and Sweet Grass trains.

Having considered the evidence, the arguments of counsel for the respective parties and authorities relied upon, this court is now of the opinion that the plaintiff should prevail in said cause, and that a decree should be entered herein granting plaintiff a permanent injunction, as prayed for in the complaint and such is the order of the court.

Brief findings of ultimate facts, and conclusions of law, may be submitted, to conform to the rule and the foregoing opinion.

CALIFORNIA RAILROAD COMMISSION

Re Rates, Rules, and Regulations of Common Carriers

[Decision No. 32418, Case No. 4293.]

Motor carriers, § 11 — Commission jurisdiction — Itinerant merchants.

1. The Commission has statutory jurisdiction to regulate and license itinerant merchants, p. 256.

Motor carriers, § 26 — Commission jurisdiction — Necessary findings — Itinerant merchants.

2. Persons desiring to engage in business as itinerant merchants must satisfy the Commission of their character, responsibility, and good faith; execute surety bonds conditioned upon honest weights, accurate representation of quality, payment for goods purchased, and performance of conditional sales contracts made in connection with goods to be sold; and keep proper records of their transactions, p. 256.

[October 3, 1939.]

PETITION *to modify point-to-point rates established in previous order; deferred pending reasonable time for operation of Itinerant Merchants' Act.*

By the COMMISSION: By Decision No. 30848 of May 19, 1938, as amended, in this proceeding, minimum rates were established for transportation of hay and related commodities by radial highway common and highway contract carriers and by common carriers participating in the movement of these commodities by use of highway vehicles. Specific rates were provided for transportation from Coachella valley, Salton Sea, Imperial valley, Lancaster, and Bakersfield territories to the Los Angeles-Hynes and San Diego territories, as those territories were defined in the decision; other rates were stated in mileage scale form. Thereafter, by appropriate petition, certain hay dealers sought a modification of the point-to-point rates so established and evidence relative thereto was received at a public hearing held in Los Angeles on September 19, 1939, before examiner P. W. Davis.

H. M. Maddaford, a hay dealer associated with Williams Bros. Grain and Milling Company; W. E. Kinsey of Western Consumers Feed Company; R. L. Wood, manager of Imperial Valley Hay Growers Association; and W. T. Graham, manager of Antelope Valley Hay Growers Association, testified in behalf of petitioners. Their testimony was substantially the same in all important respects and may be summarized as follows:

Since the establishment of mini-

mum rates for the transportation of hay and related commodities, hay dealers in southern California have been faced with increasingly serious competition from so-called "itinerant merchants" who purchase hay at producing points and transport it to and sell it at consuming markets. Due to the exceptionally large volume of available tonnage these itinerant merchants are particularly active in connection with the movement of hay from the Imperial valley territory to the Los Angeles-Hynes territory; they are relatively active also in connection with movements from the other large hay producing territories. Eleven thousand truckloads of hay, averaging 13 tons per load, were sold during the 1938, 1939 season at a lot in Hynes used exclusively by itinerant merchants. Many similar lots are located throughout the territory.

The effect of the increased activities of the itinerant hay merchants has been to depress the price of hay in the Los Angeles-Hynes markets to such an extent that the differentials between the market prices and the prices at points of production are generally substantially less than the minimum rates for the corresponding transportation by for-hire carriers.[1] As a consequence, the established hay dealers have had to forego all business except that for which, due to purchases in large volume and extensions of credit, they have been able to obtain more favorable differentials. In an endeavor to minimize their losses, hay dealers have resorted to proprietary trucking to some extent and producers marketing associations have undertaken proprietary operations on a large scale. Under these conditions, however, the hay dealers or marketing associations cannot long survive since, in addition to transportation costs, they must recover buying and selling expenses.

The foregoing change in distribution methods has reacted to the serious detriment of hay producers as well as hay dealers. Whereas, formerly, producers dealt with dealers who purchased in volume and who were able to stabilize market prices, they must now deal with itinerant merchants who are generally irresponsible and whose need for a quick disposal of their hay causes them to sell at prices which demoralize the market.

Due to the inability of hay dealers to pay the established minimum rates under existing conditions the amount of hay traffic presently being transported by for-hire truck carriers is said to be negligible.

Petitioners made no definite proposals in their petition as to what steps should be taken by the Commission to cure the situation complained of, choosing rather to present only the facts. At the conclusion of the receipt of evidence, however, the witnesses uniformly expressed the opinion that the hay traffic could only be restored to normal distribution channels by making available to hay dealers highway contract carrier rates low enough to render the field unattractive to itinerant merchants. The rates necessary to accomplish this purpose were believed by the witnesses to ap-

[1] An exhibit drawn from reports of Federal and state market news services for the 1938, 1939 season shows that the price differential as between Imperial valley and Los Angeles, for example, seldom exceeded $3.50 per ton, as compared with the minimum rate of $3.70 per ton. This differential was often as low as $3 per ton during that period.

proximate $3 per ton from Imperial valley, with rates related thereto on a mileage basis from other producing points. These suggested rates were said to approximate those being paid prior to the establishment of minimum rates. It was not contended that these rates would be fully compensatory to the larger highway contract carriers, but it was asserted that many one or two truck operators who drive their own trucks could earn a small profit at these rates and had, in fact, expressed a willingness to accept the business if offered at the proposed rates. The opinion was expressed also that many persons now operating as itinerant merchants would be glad to obtain permits as highway contract carriers and perform the transportation for hay dealers at the suggested rates. Shippers' organizations who have been keeping careful records as to their costs of conducting proprietary operations stated that their costs were about the same as the sought rates.

No highway carriers appeared in opposition to the proposal although one carrier who is engaging in other types of transportation in the Imperial valley indulged in cross-examination of petitioners' witnesses and indicated that, in his opinion, the reduced rates sought would not be compensatory. Rail carriers were represented at the hearing but did not state their position in the matter.

It will be seen from the foregoing recitation of evidence that petitioners do not contend that the minimum rates now in effect for the transportation here under consideration are in excess of the cost of performing the service by highway carriers generally, or are otherwise unreasonable per se. Their sole complaint is that, due to the activities of irresponsible itinerant hay merchants, prices of hay in the Los Angeles-Hynes market have become so depressed that hay dealers cannot afford to pay the established minimum rates. Reductions below the normal and reasonable level of minimum rates are sought principally to alleviate or cure a marketing evil, with the idea that the traffic will no longer be attractive to itinerant hay merchants; that highway carriers who cannot obtain traffic elsewhere will be willing to accept the reduced rates; and that other for-hire carriers will not be injured since they are not now enjoying any substantial portion of this business.

The Commission recognizes the need of the hay industry for stable marketing conditions. It is not convinced, however, that the means chosen is the proper one or that, if adopted, the desired purpose would be accomplished. Itinerant hay merchants were prevalent for a considerable period of time prior to the establishment of minimum rates, when rates of highway contract carriers were admittedly as low as or lower than those here proposed.[2] Although a reduc-

[2] In Decision No. 30025 of August 20, 1937, in Case No. 4088, Part "R," in which decision minimum rates for this transportation were first established, the Commission said:

"An important factor to be considered in this case is the effect of any given rate adjustment upon the volume of tonnage handled by the itinerant trucker. The record indicates that at the present time 50 per cent of the hay brought into the Hynes area is handled on private trucks. A substantial portion of this is purchased by the truck operator at the ranch and resold by him at destination, thus changing his status from that of a 'for hire' carrier to that of a dealer. From a study of 99 trucks engaged in hauling, only 46.5 per

tion in the present rates would possibly enable hay dealers to offer more traffic to highway carriers and thus encourage some of the itinerant hay merchants to change their status to for-hire carriers, and although some of the itinerant merchants would find the field no longer attractive, it seems probable that enough itinerant merchants would still remain to cause a serious threat to market stability. In any event, the for-hire carriers who would be willing to engage in the transportation at the depressed rates would not ordinarily be those who are in a position to provide the dependable and satisfactory service which the hay industry requires.

[1, 2] By legislation effective September 19, 1939 (Statutes of 1939, Chap. 876) there has been conferred upon the Commission regulatory and licensing jurisdiction over itinerant merchants. Persons engaging or desiring to engage in that business must now satisfy the Commission of their character, responsibility, and good faith; execute surety bonds conditioned upon the use of honest weights, measures, and grades, upon accurate representation as to quality or class of goods sold, upon actual payment of checks, drafts, or notes, and similar instruments issued for goods purchased, and upon the actual performance of conditional sales, consignment, or security contracts made in connection with goods to be sold; and they must keep proper records of their transactions. Manifestly, this legislation was designed to alleviate just such marketing evils as are here being sought to be curbed by a reduction in the rate level. The hearing in this proceeding was held on the date this act became effective, hence no opportunity has been had to test or observe its effect in actual operation. It would not appear appropriate, therefore, to adopt other means of remedying the situation at this time without according the new legislation a reasonable and fair trial. If after a reasonable opportunity has been had to observe the effects of the new legislation petitioners find that the conditions shown still obtain, the matter of adjusting the minimum rates will be given further consideration.

In view of these conclusions, no further order is necessary at this time.

cent operated consistently upon a 'for-hire' basis and this group not only operated the lighter equipment but it may be assumed that it was not as actively employed as were the large dealers' own fleets. After making allowance for this movement by the dealers (including the independent trucker who buys for his own account) and for the approximate 20–25 per cent of the tonnage moving by rail, it appears that there cannot be much more than 25–35 per cent of the total movement directly subject to a truck rate order, nor much more than 50 per cent subject to a rail and truck rate order."

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Bell System Plans $86,518,000 Construction Program

THE principal operating companies composing the Bell System will spend about $86,518,000 for new construction in the first quarter of this year, according to the latest available reports by system companies to the American Telephone and Telegraph Company. The current quarter's construction budget will be approximately 24 per cent larger than the one for the first three months of last year, when gross additions to plant and property aggregated $69,879,000. For the entire year 1939, the Bell System expended about $300,000,000 on plant improvement and new construction, but if the present quarter budget can be used as a "yardstick" for the entire year, it appears likely that in 1940 the system's expenditures will run considerably ahead of last year and in all probability will be the highest since 1931, when construction cost about $391,000,000.

R. H. Dragsdorf Appointed Dodge Truck Plant Manager

L. J. PURDY, general manager of Chrysler Corporation's Dodge truck plant, has announced the appointment of Russell H. Dragsdorf as the new Dodge truck plant manager replacing R. M. Hidey, recently deceased.

Mr. Dragsdorf, who for the past several years has been Dodge truck plant engineer and labor relations supervisor, has been associated with Dodge in Detroit for 22 years. He was connected with the passenger car plant engineering division for 15 years.

Coincident with Mr. Dragsdorf's appointment it was announced that A. S. Anderson, for several years in charge of the special equipment engineering department of the Dodge truck plant, has assumed the additional duties of labor relations supervisor. Harold Hocker, who has also been connected with the Dodge truck manufacturing for several years, now becomes plant engineer.

Elliott Issues New Catalog on Steam Turbine Generators

ELLIOTT Company, Jeannette, Pennsylvania, has just issued a new 32-page bulletin on steam turbine-generators. Illustrated with a wealth of photographs, both shop views and installations, this bulletin treats of turbine-generator units, of condensing, non-condensing and extraction types. It also briefly discusses the arrangement of a turbine-generator-condenser unit, shows sectional views of condensing, non-condensing and extraction turbines and includes some very usable charts giving a quick method of figuring turbine steam consumptions.

Copies may be secured from the manufacturer.

$12,500,000 to Be Spent By Potomac Electric Power

THE Potomac Electric Power Co., Washington, D. C., will spend $12,500,000 on new construction and plant expansion, Edward L. Shea, president of the North American Company, parent holding concern, announced recently. Of this total outlay, $9,500,000 will be spent in 1940.

Officials of the company said the improvement program calls for installation of a 5,000-pound boiler and a 50,000-kw. generator at the Buzzards Point generating station, a new annex to the station, new coal handling equipment and construction of a number of new substations to facilitate distribution of power throughout the city.

"CP" Sales Plan Book Issued By A. G. A. E. M.

AIMED at coördinating the promotional efforts of more than 2,500 key utility company executives and approximately 18,000 retail dealer outlets throughout the United States in behalf of "CP" (Certified Performance) gas ranges, a comprehensive sixteen-page sales plan book outlining a "Spring-Summer" campaign will be distributed shortly by the Association of Gas Appliance and Equipment Manufacturers. This was announced by Lloyd C. Ginn, chairman of the "CP" Gas Range Sales Management Committee.

Under the theme "Join the Profit Parade," the new portfolio focuses attention on the great potential domestic market for modern gas ranges. It is pointed out that out of the 16,000,000 gas ranges now in use in America's homes, more than 8,000,000 are obsolete in the light of present-day service and economy features offered by the modern gas range.

Much space is devoted in the new portfolio to acquainting utility companies and retail dealers with how they can effectively and profitably tie-in with the national promotion.

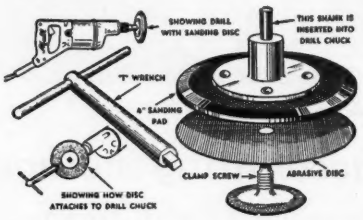
Regional and state "CP" managers are being supplied with three attention-arresting items to assist them in their campaign-developing work. These are a sound slide film, "Straight

to Your Heart," which tells the story of the various features of "CP" Gas Ranges; a set of forty-five four-color charts which present the "CP" range from a food and health savings standpoint and show that the product can pay for itself more than three times during its first ten years of service; and a second film titled, "The Parade to Profits," which dramatizes in fifteen minutes the "CP" program, the market and profit possibilities.

Sanding Pads for Use on Any Portable Electric Drill

THE Mall Tool Company, Chicago, Illinois, has introduced an improved sanding pad for use on any make, model, or size of portable electric drill. This sanding pad is ideal for doing occasional sanding jobs where the amount of work does not warrant a standard sanding machine.

The equipment consists of a four-inch sanding pad, one abrasive, a clamp screw to hold



the abrasive and pad in place, and a "T" wrench to remove or fasten the pad and abrasive.

The shank on the sanding pad is inserted into the drill chuck and tightened in the same manner as the drill bit.

The price of the complete unit is $7.00, f. o. b., Chicago.

Illinois-Iowa Power Co. Plans $600,000 Construction Outlay

ILLINOIS-IOWA Power Co. plans to spend $400,000 on construction of a transmission line in Macon, Logan and Menard counties and also to spend $200,000 on additional electric generating facilities near Decatur, Ill., according to a recent announcement.

Contracts for the work have not been awarded, but construction will start as soon as rights-of-way can be acquired.

New Line of International Diesel Crawler Tractors

A YEAR ago the International Harvester Company announced the big powerful modernly styled Model TD-18 Diesel TracTracTor. It was and still is the largest in the International crawler tractor line. Now, three new similarly styled and engineered International Diesel crawlers have just been announced. They are the TD-6 TracTracTor, smallest of the three new models; the TD-9, next in size; and the TD-14, largest of the three.

Thus, with the larger TD-18, previously announced, the International Diesel crawler line now consists of four sizes, with drawbar horsepower ranging from 30 for the TD-6 to more than 70 for the TD-18. A TracTracTor of same size as the TD-6 and to be known as the T-6 will be available very soon with a combination gasoline-distillate engine.

Every one of these new TracTracTors is equipped with a full Diesel engine giving full Diesel fuel economy. As has been the case with other International Diesels, each engine of this new line is provided with a distinctive method of starting by which it starts on gasoline and, after about a minute of operation, shifts to full Diesel operation. A conventional automotive-type electric starter is regular on the TD-18 and is available as special equipment for each of the other models.

The new TD-9 and TD-14 respectively have more power, wider speed range, and greater adaptability than the TD-35 and TD-40, which have been proving themselves in all sorts of work the past several years. The TD-6 is entirely new and is the smallest International Diesel TracTracTor ever developed.

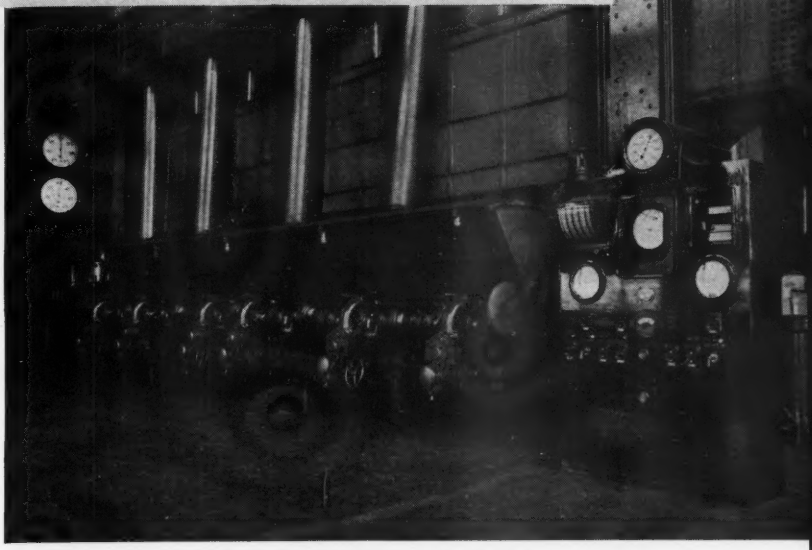
New Mexico Gas Co. Plans Improvement Projects

THE New Mexico Gas Company will spend $232,061 for improvements, particularly the construction of a natural-gas transmission line from Albuquerque to Las Lunas and Belen, N. M., according to a recent announcement.

Michigan Consolidated Gas to Spend $3,500,000

A $3,500,000 construction program for 1940 was announced recently by William G. Woolfolk, president of the Michigan Consolidated Gas Company. Mr. Woolfolk said $3,000,000 would be spent to keep the distributing system abreast of changing requirements and growth in new residential sections.

J&L SEAMLESS STEEL BOILER TUBES ASSURE SAFETY AND ECONOMY IN THE MAINTENANCE AND OPERATION OF YOUR BOILERS • • • •



J & L Boiler Tubes keep boilers working efficiently and economically because into every length of J & L seamless tubes is built an extra margin of strength and safety. There are no welds; therefore, there can be no failure at or near a weld — boilers stay on the job longer with fewer costly shut-downs.

When replacements or repairs are necessary, J & L Boiler Tubes form easily, roll in faster and they "stay put." Installations in power and manufacturing plants all over the country are proving that J & L Seamless Steel Boiler Tubes help make maintenance dollars go further.

The next time you need boiler tubes, specify J & L Seamless. Make sure you get tubes that give you low installation cost and last longer. Write today for a copy of the J & L Seamless Steel Boiler Tube Bulletin.

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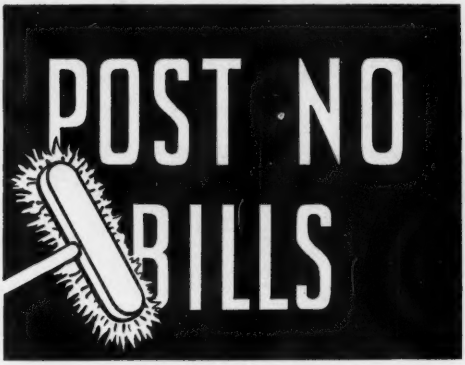

on Dog-Eared Machine Accounting Forms

Watch out for dog-eared forms. They are a sure sign of poor paper. And poor paper means smudgy, illegible typing; sloppy erasures; sagging, crumpled, hard-to-file forms and sticky, drooping index cards.

You can end these faults — and the mistakes and inefficiency that go with them — by making Weston's Machine Posting Ledger and Weston's Machine Posting Index your standards for all machine accounting forms and index cards.

WESTON'S MACHINE POSTING *Ledger*

Made especially for machine bookkeeping in Buff, in subs. 24, 28, 32 and 36, and in White, Blue and Pink, subs. 32. Has 50% rag content for strength and durability and a perfect surface for smudge-proof typing, easy filing, clean erasing; and a one-way grain direction that makes forms stand straight in trays or binders. Moderately priced.

WESTON'S MACHINE POSTING *Index*

Made in Buff, White, Blue, Ecru, Salmon and Pi in 180M, 220M, 280M and 340M—basis 25½x30 Has a ledger finish that takes typing clearly; wi not smudge and can be erased repeatedly. Extr strength and snap make index tabs stand u without bending or tearing.
WINCHESTER INDEX comes in the sam weights and colors at the same price.

Write Byron Weston Co., Dept C., Dalton, Mass., for sample books showing all weights and colors of both index and ledger grades, and for* Weston's Papers, *an interesting publication packed with ideas and information about paper.

WESTON'S PAPERS

THIS DURABLE CONDUIT

COSTS LESS TO INSTALL

Uniformly strong and durable, J-M Transite Conduit retains its true form under sustained loads—requires no concrete envelope underground or in exposed locations. Its long, light lengths are easily handled, rapidly installed.

COSTS LESS TO MAINTAIN

Made of asbestos and cement, Transite Conduit is highly resistant to smoke, acid fumes, weather and corrosive soils. It will not rust, rot or decay, is completely incombustible. Maintenance costs are kept to a minimum.

RETAINS ITS SMOOTH BORE

The original smooth interior of Transite Conduit *stays* smooth. Joints are tight and snug—free from jagged obstructions. Cable pulling is easier—long pulls may be made without injuring the sheath—cables are easily removed.

You should have complete information about Transite Conduit and its thinner-walled companion product, J-M Transite Korduct. Write for Brochure DS-410. Johns-Manville, 22 East 40th Street, New York, N.Y.

Johns-Manville TRANSITE CONDUIT

Now, IT'S INSURANCE!

TWO MIGHTY FORCES, representing two conflicting theories of human relations, are at grips today.

One group fights for the traditional American way of free enterprise—with its balance sheet of trial and error, mistakes offset by brilliant contributions to progress. The other fights for the belief that the energies of the individual can best be controlled by political agencies, for the greatest good of the greatest number.

Both are sincere. But the case for political control makes us the victims of a popular delusion. As a noted sociologist expressed it: "The greatest fallacy in human logic is to attribute to present social or economic systems those problems which arise from the nature of man himself."

In their eagerness to promote the cause of national planning, its proponents through investigations discover and emphasize "those problems which arise from the nature of man himself." Thus unusual episodes appear as major defects seeming to condemn the free enterprise system. Control by Federal bureaus is then proposed in the name of reform.

This has been the course in relation to banking, power and light, manufacturing, labor relations, oil, coal, communications.

Today another Federal investigation is publicizing the problems of insurance "which arise from the nature of man himself," insignificant though they are compared to the amazing contribution of insurance to human welfare.

If the people accept the fallacy that there is cause for condemning the institution of insurance, the camel's nose will slip under the tent.

The nose will represent a little competition—compulsory burial insurance and Federal Annuities; a degree of Federal control; a small part in the determination of how insurance investments shall be made; a hand in the administration of the business operation. But the first steps along this road, as history and recent events make clear, are never retraced, but call for further steps.

This message is published by

NATION'S BUSINESS

It is the 38th of a series contributed toward a better understanding of the American system of free business enterprise. Regardless of your political affiliations, if you have a point of view you would like to express on developments now shaping in the field of public policy relative to insurance, why not write to your Congressman or Senator?

PROFESSIONAL DIRECTORY

• These pages are reserved for engineers, accountants, rate experts and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design and construction.

PROFESSIONAL DIRECTORY (*concluded*)

INDEX TO ADVERTISERS

[The Fortnightly lists below the advertisers in this issue for ready reference. Their products and services cover a wide range of utility needs.]

*Fortnightly advertisers not in this issue.

Better PRODUCTS . . .

because CITIES SERVICE knows your problems!

CITIES Service engineers, backed by 78 years of practical lubrication experience, are concentrating their efforts daily on solving the various lubrication problems with which industry is faced.

Wherever moving surfaces come together, no matter what the speed or load, Cities Service can recommend authoritatively the correct lubricants to use. Whether you need heavy greases for massive gears or the lightest of oils for delicate precision machines, Cities Service is ready to fill your every need.

Cities Service engineers will be glad to discuss your lubrication problems with you.

◆ ◆ ◆ ◆ ◆

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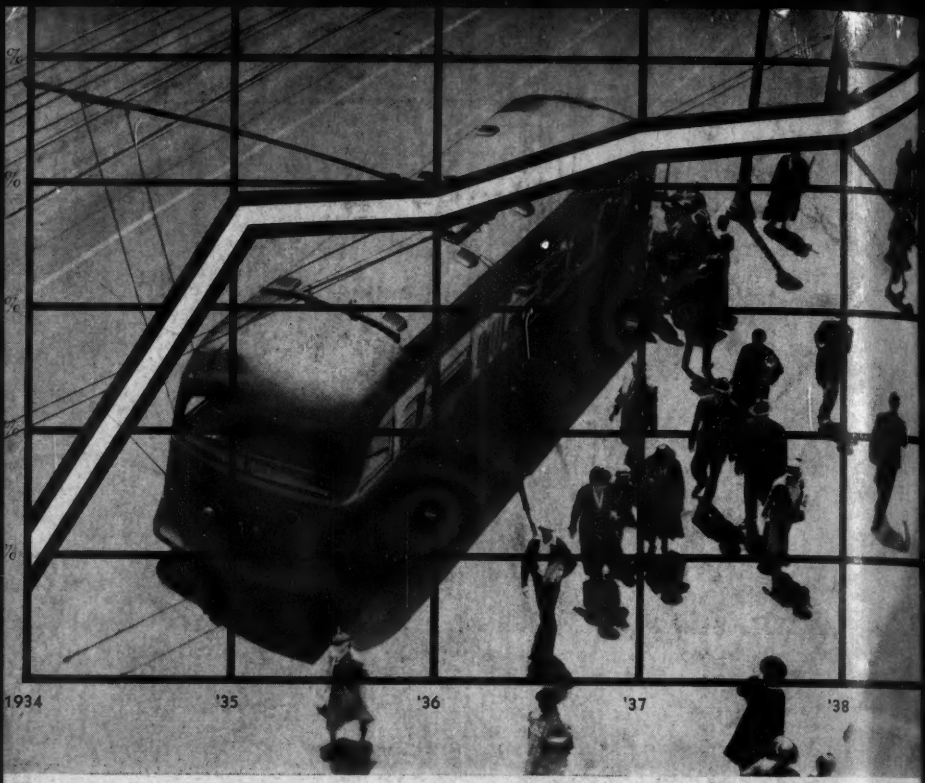
Cylinder Oils
Star Ice Machine Oils
Leather Finishing Oils
Loom Oils
Marine Engine Oils
Quenching and Tempering Oils
Sewing Machine Oils
Spindle Oils
Transformer Oil
Turbine Oils
Wool Oils

Hour of Stars—The Cities Service Concert with Lucille Manners, Ross Graham, the Cities Service Orchestra and Singers under the direction of Frank Black, broadcast every Friday evening at 8 P.M., E. S. T., over the N. B. C. Red Network.



MAKING KILOWATT-HOURS GROW ON WHEEL

AN amazing come back has been staged by electric transportation. Five years ago, ess than 5% of all new vehicles purchased in year for city service were electrically pow- ered. Led by the largest annual sales in trolley-coach history, last year this figure reached 26%. *A five-fold increase in five years!*

It makes little difference how you consider t—whether 10 trolley coaches (an average ine) use 30 kilowatt-hours per mile, or whether, in revenue dollars, they are equiv- alent to 240 electric ranges. The important fact is: last year electric-transit vehicles accounted for more than 4 billion kilowatt- hours of the electric-service companies' oad.

The swing to electric transit is not ac tal. It's the result of intensive wo create new vehicles that would set standards of transit comfort—and a patronage. The public response has remarkable. In every city where p have had the opportunity to compare ern electric vehicles with modern gas and vote their choice, they have *pre the electrics.*

General Electric's assistance in devel these vehicles and promoting their us contributed much. One tangible resu increased load for you—increased de ence on your service, a service to wh large part of our efforts is constantly cated.

GENERAL ELECTRIC

93-657B